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No. 14,919

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LOUIS E. WOLCHER, *Appellant,*

v.

UNITED STATES OF AMERICA, *Appellee.*

APPELLANT'S OPENING BRIEF

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v.

UNITED STATES OF AMERICA, *Appellee.*

APPELLANT'S OPENING BRIEF

JURISDICTIONAL STATEMENT

Louis E. Wolcher, the appellant, was indicted for violation of section 145(b) of the Internal Revenue Code of 1939, 26 U.S.C. sec. 145b, for wilful evasion of income tax. The jury found the defendant guilty, with a recommendation of leniency. The District Court entered judgment on

September 4, 1953, sentencing him to two years imprisonment and a $10,000 fine.

On September 2, 1955, defendant filed in the District Court, pursuant to Rule 33 of the Federal Rules of Criminal Procedure, a motion for new trial on the ground of newly discovered evidence, with supporting affidavits (R. 3, et seq.). The District Court entered an order dated September 12, 1955, denying the motion for new trial (R. 26). Defendant appeals from said order. Notice of appeal was filed September 21, 1955 (R. 27).

The provisions sustaining jurisdiction are:

(a) Jurisdiction of the District Court: Rule 33 of the Federal Rules of Criminal Procedure; 18 U.S.C. sec. 3231.

(b) Jurisdiction of this Court: 28 U.S.C. sec. 1291; 28 U.S.C. sec. 1294. In *Balestreri* v. *United States,* 224 F. 2d 915, this Court ruled that it had jurisdiction of an appeal from an order denying a motion for new trial on the ground of newly discovered evidence.

CONCISE STATEMENT OF THE CASE

A. General Background

This Court, in its opinion on the appeal from the conviction (*Wolcher* v. *United States,* 218 F. 2d 505), made reference for a background statement to its earlier opinion (*Wolcher* v. *United States,* 200 F. 2d 493), where the Court stated:

> "The theory of the Government's proof was that during the year in question Wolcher collected large sums from the sale of whisky from which he derived income which he failed to return. The sales were made through San Francisco liquor wholesalers who would receive checks for the ceiling price of the liquor while the purchaser would pay an additional over ceiling amount in cash which went to Wolcher. His income tax return reported no gross income from sales of liquor at wholesale (which the sales above

described were) except for an item of $3,000 profit made on a transaction not involved here.

"Wolcher admitted the over-ceiling transactions, but contended that although he received those proceeds he made no profits from these operations for the reason that in purchasing or acquiring the liquor, he himself was obliged to make over-ceiling payments or bonuses in a large amount, and that the sums so paid wiped out any possible profit. He testified that the amounts so laid out by him were paid to one William Gersh, stating that on some shipments the over-ceiling bonus paid Gersh amounted to $20 and on others to $25 a case. He fixed the amount which he had thus paid Gersh as approximately $115,000. Gersh was the publisher of a New York City trade paper called 'The Cash Box' devoted entirely to coin machines. Wolcher operated a concern which sold coin operated machines and he had known Gersh for 15 or 20 years. Wolcher testified that he sent substantial sums of money to Gersh during the period in question and that these remittances were made by check and by cash either through the mail or by express or delivered to Gersh in person."

B. Proof at Trial

The proof at the second trial showed ultimate receipt by Wolcher of cash payments over ceiling on whiskey sold at wholesale to tavern owners.

1. Appellant received 5,138 cases of whiskey through three San Francisco licensed liquor wholesalers. The great bulk of the whiskey,—all but 500 cases—came from the East Coast. Four shipments from the East came through wholesaler Franciscan Distributing Co. and two eastern shipments came through George Barton Co. The 500 cases appellant bought from Rathjen Bros.

The representatives of Franciscan Co. (Samuel Weiss) and George Barton Co. (James Oligny) testified that usual distiller sources were drying up so far as their firms were concerned, but that arrangements were made by Wolcher

to get the whiskey from the East. To handle the importing, Franciscan Co. received a fee of $2 per case. Barton Co. received a fee of $1 per case on one shipment. On another shipment it divided the margin permitted to wholesalers under OPA, Wolcher's share being $3,000. (R. 14109, pp. 100-105, 122ff, 140-142.)

Vance Hammerly, auditor for Rathjen's, testified that the company was so short of liquor that it instituted allotments of whiskey among its 5,000 customers in accordance with previous purchase volumes, that however, this was not done in the case of these 500 cases of Old Brook whiskey sold to Gold Coast, a bar owned by defendant, and that these were not handled by Rathjen's general commission salesmen but by a house salesman, Ray Worthy.[1]

2. The proof of appellant's cash receipts was made out in part by the Government, through the testimony of thirteen tavern owners and Roy Clemens. The Government also introduced defendant's guilty plea to a charge of ceiling violation on whiskey involved in the present case (R. 239-245).

Appellant not only conceded the receipts established by the Government but indeed admitted black market sales at wholesale and cash receipts of between two and three times the amounts established by the Government witnesses.

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[1] Rathjen's ledger sheets (Deft's Exh. C and D) show that for months before and after this sale to the Gold Coast in May, 1943, the largest sale by Rathjen for any month to either Gold Coast or Silver Rail Taverns never exceeded $600 in round numbers. In contrast here was a sale invoiced for $25,950, for 500 cases (R. 14109, p. 46).

The proof of over-ceiling receipts by defendant, as summarized in the summation to the jury by Assistant United States Attorney Schnacke, was as follows:[2]

Cases of Whiskey Purchased by Defendant	Black Market Sales No. of Cases	Unreported Profit
A. Shipped from East Coast to:		
Franciscan Distributing Co.		
100 Supreme Bourbon	68	$ 1,472.20
500 Schenley Royal Reserve	335	7,292.95
500 Golden Wedding	450	11,475.00
1,000 Gallagher & Burton	815	21,243.00
George Barton Co.		
500 Gallagher & Burton		
2,038 Old Boston Rocking Chair	1,432	47,370.56
		$88,853.71
B. Purchased from Rathjen Bros.		
500 Old Brook	300	6,150.00
5,138 Total	3,400	$95,003.71

3. Evidence of Appellant (Record References, Record No. 14109). Appellant Wolcher testified that he did not report the overage he received on sales of whiskey on his income tax return because the overages he received were approximately equal to overages which he had to pay (R. 366). (He reported income of $66,900. The indictment charged his income was $102,000. R. 25.)

During 1943 appellant had a direct interest in three taverns selling liquor by the glass and certain members of his family were interested in three other taverns selling liquor by the glass (R. 346-7). Appellant testified that in 1943 he made efforts to get whiskey for the taverns belonging to him and his relatives, that this was his original

[2] The data in the Table are from pp. 3-9, Transcript of Mr. Schnacke's opening argument August 31, 1953.

Transcripts of the summations at the trial are part of the record on this appeal (R. 65-6).

motivating thought, and it spread into getting whiskey for customers and friends (R. 409, 418). Later when he saw how this was expanding into friends of friends and large volumes, he stopped it (R. 411). In his efforts to get whiskey for his bars, he contacted wholesalers, advertised in the papers (Deft. Exh. E), but all without success. (R. 385-387).

He acquired whiskey by paying over-ceiling prices, the same whiskey he sold at prices over ceiling. The whiskey which he purchased over ceiling was transferred at ceiling to taverns owned by him and members of his family (R. 366). Generally other purchasers paid him over-ceiling prices (R. 426ff).[3]

Appellant testified that for the purpose of acquiring whiskey from the East, he contacted William Gersh, who published a coin machine paper. He first had a talk with Gersh about whiskey in the spring of 1943.[4] As a result he sent Gersh $5,000 in June 1943, not to pay for the whiskey but to apply on the overage that the whiskey cost over and above its regular invoice price. As a result the first shipment of whiskey arrived from the East through Franciscan Co. (R. 353-9.) In his first arrangement with Gersh he was to pay $20 a case overage above ceiling. This continued for three shipments. Thereafter at Gersh's suggestion the overage was $25 a case. (R. 361-2.)

Appellant further testified: I sent the money to Gersh in various ways. I would issue a check and buy a bank draft for it; or I would buy a bank draft for cash without having issued a check; or I would send the money to him in cash by mail or express, or if I saw him I would deliver it to him either in cash or by check (R. 359-360).

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[3] Appellant testified that there were a few close personal friends he might have let buy at ceiling (R. 429-431).

[4] Appellant was asked what conversation he had with Gersh. The Government objected and the objection was sustained (R. 355-6).

I definitely recall sending the following payments to Gersh, all to be applied against the overage of the whiskey (R. 361).

$5,000 in June 1943 (R. 358). I drew a check upon my bank account (Deft. Exh. E, R. 370) and purchased a bank draft which I sent him (R. 363).

3,300 cash by mail in the middle of August 1943 (R. 359).

5,000 at the end of August 1943, in cash by mail (R. 461).

12,500 by cashier's check payable to Gersh dated September 29, 1943 (Deft. Exh. I), which I purchased for cash (378-9).

60,000. Of this amount $30,000 was in cash and $30,000 was in a bank draft, which I delivered to him in New York in November, 1943 (R. 360-361); Deft. Exh. F, R. 371-2).[5]

30,000 cash by express in December or January 1944 (R. 362).

And there were a number of mailings to Gersh of $1,000; $1,200; $1,500 apiece (R. 404).

In 1944 I gave Gersh $3,000 cash in New York for the purpose of winding up our transactions (R. 367-8).

During this period I received money back from Gersh in accordance with our understanding for the two instances when I transferred money by check in a way that appeared on my books. I entered the original $5,000 on my books

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[5] On cross-examination defendant was asked if the $30,000 draft, a check on a Portland bank payable to Lou Wolcher, and endorsed by Wolcher and Gersh, did not represent merely an accommodation by Gersh in helping Wolcher to cash his check. (R. 397-8.) That was Gersh's testimony at the first trial (Record 12992, pp. 560-562; Appendix C to Petition for Certiorari, pp. 20a-22a.)

as a suspense item, Bill Gersh. When he returned the $5,000 by check dated August 13, 1943 (Deft. Exh. G, R. 374), we put it in the bank account and cancelled the entry (R. 364).

In November 1943 I didn't have enough over-ceiling money to send the required cash and I borrowed $30,000 to buy a bank draft payable to me which I endorsed over to Gersh. That was the same, for all practical purposes, as a check on my bank account. He was to return that money to balance off my books (R. 380). He sent me a check for $22,750, dated February 1, 1944 (Deft. Exh. H, R. 375) and a check for $2,000 drawn by his wife (R. 379); Deft. Exh. J, R. 383). Gersh's accountant suggested that I let Gersh pay for some equipment, to account in some measure for his handling that money. I arranged for Gersh to make a payment of $5,250 to Runyon Sales Co. for some phonographs I had purchased. (R. 376-7.)

The $12,500 cashier's check which I bought for cash did not appear on my books, and Gersh never returned that money. Nor did he return any of the cash money I sent him. (R. 379.)

Appellant testified that he kept no books as such on these transactions, and kept only a brief memorandum record at that time of amounts owing, which he later disposed of so as to avoid unnecessary records involving a black market commodity (R. 382, 437-439).

The instances that involved a written record, because checks were used, were covered up so as to avoid showing a whiskey transaction. (R. 403-5.)

On cross-examination it was brought out that appellant had no record of the money he sent to Gersh by mail or by express (R. 403-4).

Appellant pointed out that he made no profit overall on the whiskey sold at wholesale, but that his sales over ceiling did yield a profit, which was duly reported, in the sense

that liquor which was otherwise unavailable was purchased and sold by the glass in the taverns owned by him and his family, and that the case purchases by these taverns were made at ceiling as a result of his purchases and sales. "So there was a profit made, but not from the sale of the liquor by the case as such." (R. 410.) There is no contention of understatement of income in the returns for these taverns.

Defense counsel was stopped from asking questions of Richard Appling, special agent in charge, to lay a foundation for introducing in evidence the bank account records of William Gersh, which were exhibits at the first trial. Mr. Schnacke objected that the bank account of some stranger to the trial was not material, and the line of questioning was stopped. (R. 465-6.)

It should also be noted that Gersh's bank account record corroborated the cash transfers by Wolcher to Gersh of $3,300, deposit entry August 11, 1943; $5,000, deposit entry August 31, 1943; and $30,000, deposit entry January 4, 1944. The record at the first trial shows that, faced with these bank records, Gersh admitted these cash receipts from Wolcher not only in his testimony at the trial but also to the revenue agents. See petition for certiorari, pp. 15-16, and record references in appendix accompanying petition.

C. Trial Court's Charge

This summarized the contentions of the Government and defendant and instructed the jury as follows (R. 14109, 382-3):

> "Now I think it might be well if I very briefly stated to you what the Court believes is the issue of the case as it appears from the contentions respectively of the parties—the Government on the one hand and the defendant on the other hand. The Government contends, as appears from the argument made by Government counsel, that the cash monies that the Government proved the defendant received from the sale of liquor and which the defendant admitted that he received, were income and were net income, and that the

whiskey was purchased for the purpose of making a profit on it in its resale and not for the benefit of the defendant's own taverns, or his friends'. The Government contends that there were no records of the transaction kept by the defendant, and that that was so that he could keep the proceeds without paying any tax on them. The Government contends, as stated by the Government lawyer, that the defendant's account of sending large amounts in cash through the mail and otherwise to someone in the East is a story that is fabricated and should not be believed by you. That, I think very briefly, is the Government's contention.

"The defendant, on the other hand, admits that the black market transactions were had by the defendant, but contends that he made no profit in connection with these transactions and that therefore he had no net income and that therefore he is not chargeable with any evasion of income taxes; that he made no profit in the matter, because he had to pay out certain monies in connection with the transactions and that therefore the net result was that he had no profit in the matter, and that therefore he is not chargeable with a violation of federal statute.

"So that in my opinion brings the issue of the case down to a very simple, and that is this—that since the Government has proved and the defendant has admitted receiving the cash over ceiling prices, the issue is whether you do or do not believe the testimony and the story told by the defendant in the case. If you believe his story, then you should return a verdict of not guilty. If you are convinced beyond a reasonable doubt that his story should not be believed, then you are justified in returning a verdict of guilty."

D. The Motion for New Trial and Supporting Affidavits

1. Mr. Corriston's affidavit concerning Gersh's whiskey black market arrangements.

The motion for new trial on the ground of newly-discovered evidence was accompanied by two affidavits, one by Edwin F. Corriston (R. 13), and one by Murray M. Chotiner (R. 18).

The affidavit of Corriston summarized is to the effect that in 1943 he met Gersh in New York; that Gersh told him he had been in contact with Wolcher, a mutual friend; that Wolcher had some taverns on the West Coast and was having difficulty in obtaining whiskey on the Coast; that he, Gersh, had told Wolcher he could get him whiskey in the East and that he had received cash from Wolcher, which he had with him, for making payments over the ceiling; that he, Gersh, did not know exactly where to get the whiskey although he knew it was procurable in the East and asked me whether I might, through my contacts in the whiskey field, know where he could get a quantity of whiskey for Wolcher; that apparently to convince me that he was seriously interested in buying this whiskey he pulled out an envelope and showed a wad of hundred dollar bills.

The affidavit goes on to state that affiant called Gersh and told him to contact a Frank Mayer in New Jersey and that Mayer was expecting to hear from him; that thereafter Gersh thanked affiant for making the contact; that affiant and Gersh agreed that Wolcher should be kept in ignorance of the fact that affiant had helped Gersh in this matter; that several months later Gersh told him at lunch that the previous contact had petered out that Wolcher needed more whiskey and did affiant have any further ideas on where he, Gersh, could get it.

Affiant relates that a few days later he advised Gersh that he, Gersh, would be contacted by a man named Garry Taylor or his associate Carlin; that Taylor called affiant and said the transaction would require about $50,000 in cash and that he and Carlin wanted to be sure that Gersh was good for so much money; that affiant told Gersh what Taylor had said, that Gersh said that was no problem as he had already received plenty of cash from Wolcher, and that affiant passed that information on to Taylor.

The affidavit continues that, as a result of these calls, affiant arranged a meeting between Taylor, Gersh and himself in New York and that he told Gersh that Taylor wanted Gersh to bring $10,000 with him to the meeting to show good faith and make the deal; and that the meeting was held. There was a conversation pertaining to the monies involved; Taylor said there was approximately $50,000 involved in cash payments for the whiskey; that Gersh said he had all the money in hand and was prepared to pay for the shipments when ready. Taylor said he wanted $10,000 now. Gersh handed Taylor an envelope and said it contained "ten big ones" as a deposit; Gersh and Taylor left the table for a few minutes and when they returned Taylor said everything was O.K. The affidavit further states that Wolcher was never advised of this transaction until after the last affirmance of his conviction by this Court.

2. Mr. Chotiner's affidavit of statement of United States Attorney Burke concerning evidence in his possession.

Mr. Chotiner's affidavit in support of the motion for new trial states that on December 15, 1953, some months after the second conviction, Mr. Chotiner, in his capacity as counsel for defendant, conferred with United States Attorney Lloyd H. Burke, and that Mr. Burke then told him in substance and effect:

> We have evidence that the money Wolcher paid to Gersh was passed on to people very high in the Syndicate, who had no relation or contact with Wolcher, with very little, if any, of the money being retained by Gersh."

As noted in the argument before the District Judge this affidavit is based on notes which Mr. Chotiner made in his hotel room in San Francisco, immediately following his talk with Mr. Burke and while everything was fresh in his mind (R. 45). (Mr. Chotiner advises that he has these notes.)

In regard to the significance of the newly-discovered evidence, the motion for new trial pointed out that in his summation Mr. Schnacke had tellingly argued that there was no support or corroboration for any of defendant's testimony as to shipping cash to Gersh for use in black market whiskey purchases, or for defendant's testimony that the $12,500 sent by check to Gersh was for this purpose. (R. 6-8.)

There was filed with the District Court, to aid in consideration of the issues, the printed transcript of the trial; certified transcripts of the summations; the petition for certiorari, Government's opposition and petitioner's reply brief. (R. 5.) These are all part of the record on this appeal. (R. 64-5.)

The motion for new trial prayed that the prosecution be required to disclose all the evidence known to the Government as set forth in Mr. Chotiner's affidavit. (R. 12.) Defense counsel submitted to the court that at least the first step should be production for inspection by the District Judge. (R. 50.)

E. Opposing Affidavit of United States Attorney Burke

The United States Attorney, Mr. Lloyd H. Burke, filed an opposition to the motion supported by his affidavit (R. 19) in which he states that he had a 45-minute conversation with Mr. Chotiner in December of 1953; that he could not recall with any degree of accuracy the language used; that it was possible that he made the statement to Chotiner that he had evidence that the money paid to Gersh was passed on to people very high in the syndicate, etc. The United States Attorney qualifies this by stating in his affidavit—although he does not assert that he stated this to Mr. Chotiner—"that the word 'evidence' if used was intended to mean all information, whether the result of speculation, rumor, suspicion or otherwise." He further

states in his affidavit that he has no knowledge of any legal evidence other than the testimony adduced at the trial to the effect that Gersh was engaged in black market liquor transactions.

F. Order of the District Judge

The order of the District Judge stated that the motion for a new trial, with supporting affidavits, "in my opinion, fails to set forth any legal basis for granting a new trial to the defendant on the ground of newly discovered evidence." (R. 26.)

G. Justice Douglas' Opinion and Order Granting Bail

The Appendix to this brief contains the opinion of Mr. Justice Douglas, Circuit Justice for the Ninth Circuit, December 31, 1955, granting bail pending the disposition of this appeal.

SPECIFICATION OF ERRORS

Specification No. 1

The District Judge erred in ruling (R. 26) that the Corriston affidavit (R. 13) was not a legal basis for granting the motion for new trial on the ground of newly-discovered evidence.

Specification No. 2

The District Judge erred in failing to require the United States Attorney to produce for examination by the Court any evidence in his possession, that the money Wolcher paid to Gersh was passed on to people high in the whiskey syndicate, who had no relation or contact with Wolcher, notwithstanding the assertion of the United States Attorney that such evidence in his possession is not legally admissible.

Specification No. 3

The District Judge erred in failing to set forth findings of fact and conclusions of law.

ARGUMENT

Wolcher admits over-ceiling receipts on sales of whiskey but defends on the ground of amounts paid to Gersh to use as cash bonuses in acquiring the whiskey in the black market. He appeals to this Court in order to gain the right to establish his innocence by the use of newly discovered evidence which corrobates otherwise unsupported testimony on the critical issue that he made payments to Gersh for the purpose of buying whiskey in the black market.

This case marks Wolcher's third appearance before this Court. Insistently the Government's attorneys, on one basis or another, have sought to prevent a full showing concerning Gersh.

On the first appeal, Gersh, as rebuttal witness for the Government, admitted receipt of large sums from Wolcher, but contended they were to buy coin machines which required advance payments in cash. This Court held inter alia that Wolcher should have been permitted to impeach Gersh by introducing trade journals showing that such advance cash payments were not necessary to buy coin machines. *Wolcher* v. *United States,* 200 F. 2d 493.

On the second trial, Gersh, who had been subpenaed by the Government, was not called as a witness. The jury, which recommended leniency, was not even aware of Gersh's bank records, which had been exhibits at the first trial, corroborating substantial cash payments to Gersh. The District Judge stopped questioning of the internal revenue agent concerning the Gersh bank records, and denied the application to reopen made by defense counsel upon learning that Gersh, who had been released from Government subpoena, was in fact available in San Francisco. This Court held that the procedural ruling of the trial judge would not be disturbed on appeal. *Wolcher* v. *United States,* 218 F. 2d 505.

Mr. Corriston's testimony presented by this motion for new trial is of undoubted significance. It makes available for the first time evidence strongly and clearly corroborating the otherwise uncorroborated testimony of appellant on the crucial issue that his payments to Gersh were for the purpose of obtaining whiskey in the black market. It further substantiates Wolcher's testimony that he delivered $30,000 cash to Gersh in person in November, 1943.

The issue is whether the rules of evidence prohibit the admission of this significant testimony. A second issue is whether the United States Attorney may refuse to disclose to the Court evidence in his possession that corroborates Wolcher on this same matter merely by asserting that in his opinion the evidence is not legally admissible.

I. THE DISTRICT JUDGE ERRED IN RULING THAT MR. CORRISTON'S AFFIDAVIT WAS NOT A LEGAL BASIS FOR GRANTING THE MOTION FOR NEW TRIAL.

(Specification of Error No. 1)

The District Judge ruled that the motion and supporting affidavits failed to set forth a legal basis for granting the motion for new trial on the ground of newly discovered evidence (R. 26).

In regard to Mr. Corriston's affidavit, this reflects a ruling sustaining the Government's position (R. 24) that the motion for new trial must be denied on the ground that Corriston's testimony would not constitute legally admissible evidence.

A. Corriston's testimony concerning Gersh is not inadmissible as res inter alios acta and does not relate to a "stranger" to the case or the issues. It corroborates defendant's explanation on the heart of the case.

The Government argues that Corriston's testimony is hearsay and is such that, if produced at the trial, would have been inadmissible as res inter alios acta (R. 24), a phrase or maxim which describes the inadmissibility of

evidence of things done between strangers and invokes the question of relevancy. 77 C.J.S., "Res" (Maxims), p. 275; Bouvier, Law Dictionary (3rd rev.) p. 2161.

Gersh is emphatically not a stranger to this case or to the issues in the case. Wolcher's defense to the charge of income tax evasion is like a plea of confession and avoidance. He admits the over-ceiling receipts on his sales of whiskey, but pleads that he made over-ceiling payments on his purchases of case whiskey.

He testified that he made arrangements with Gersh for Gersh to get whiskey for appellant by paying cash bonuses in the whiskey black market, and that he sent large sums to Gersh, not for the whiskey proper, but for the black market overage, the amount that the whiskey cost over and above the regular invoice price.

It is manifest, as Justice Douglas stated in his opinion (Appendix) that if Corriston's evidence is admissible "it might well tip the scales in defendant's favor, as it goes to the heart of the case."

Indeed that conclusion is actually implicit in this Court's ruling on the first appeal where it held that the issue as to the purpose of Wolcher's sending money to Gersh was so material that it found reversible error in the exclusion of trade journals showing that advance cash payments were not necessary to purchase coin machines. *Wolcher* v. *United States,* 200 F. 2d 493 (9th Cir.). That evidence merely impeached the explanation of Gersh, that he had received money from Wolcher to pay cash in advance for coin machines.

Corriston's testimony is much more significant since it affirmatively corroborates Wolcher's otherwise unsupported testimony that his money transfers to Gersh were to obtain black market whiskey. There is, of course, a fundamental distinction between corroborative evidence, confirming the otherwise unsupported testimony of a defendant, and cumulative evidence, which refers to evidence

of the same kind as that already in the case. 32 C.J.S. Evidence, p. 1039. Corriston's corroboration of Wolcher's explanation fills the critical gap stressed in Mr. Schnacke's summation that Wolcher's explanation of transfers to Gersh in order to get black market whiskey was unsupported by other evidence (R. 7-8).

B. Corriston's testimony is admissible as part of the res gestae

The Government's hearsay objection is answered by the rules of evidence governing "res gestae".

1. The hearsay rule is not involved at all where conversations are introduced in evidence as proof of a matter in issue. Wigmore, Evidence (3d ed.) sec. 1770(1). In this case Gersh's solicitations, negotiations and verbal agreements for the black market whiskey purchase are admissible on this ground. That they are admissible as proof of a matter in issue is demonstrated by Mr. Schnacke's own telling argument to the jury (R. 8) that Gersh was identified with the coin machine field, and was not shown by any evidence whatever to have been engaged in any black market whiskey transactions.

Since in this case Gersh's conversations were in and of themselves activities in the whiskey black market, testimony concerning these conversations is not objectionable as hearsay.

2. Moreover, Gersh's conversations fall within the exception to the hearsay rule that is most commonly referred to when the doctrine of admissibility of the res gestæ is invoked. That is a rule,—applicable where there is a "main fact" or principal transaction which is admissible in evidence,—to cover the circumstances, facts and declarations which "grow out of" the main fact or principal transaction and serve to illustrate its character, and are contemporary with it or so nearly connected with it as to form a part of it. Wigmore, Evidence (3d ed.) sec. 1767 et seq.; Jones, Evidence (4th ed.), sec. 358; Wharton, Criminal Evidence (10th ed.), sec. 262ff; 32 C.J.S., Evidence, sec. 402, 411.

The main fact may be "either the ultimate fact to be proved or some fact evidentiary of that fact." 32 C.J.S., Evidence, sec. 405.

The Supreme Court regards the doctrine as based in part on the distortion which would result if the "verbal facts" were stricken from a context where what is done and what is said are necessarily interrelated (*Insurance Co.* v. *Mosley,* 8 Wall. 397, 408).

In *St. Clair* v. *United States,* 154 U.S. 134, 149 (1894), the Court accepts Wharton's analysis, justifying admission of the res gestae, whether doings or declarations:

> "Their sole distinguishing feature is that they should be the necessary incidents of the litigated act; necessary in this sense, that they are part of the immediate preparations for or emanations of such act, and are not produced by the calculating policy of the actors. In other words, they must stand in immediate causal relation to the act—a relation not broken by the interposition of voluntary individual wariness seeking to manufacture evidence for itself. Incidents are thus immediately and unconsciously associated with an act, whether such incidents are doings or declarations, become in this way evidence of the character of the act."

Wharton thus distinguishes between res gestae as "events speaking for themselves" through the words and acts of participants, and the words and acts of participants "narrating the events." What is said or done by participants "under the immediate spur of a transaction becomes thus part of the transaction, because it is then the transaction that thus speaks." Wharton, Criminal Evidence (10th ed.), sec. 262.

Business relations are governed by the same general doctrine that "declarations which are the immediate accompaniment of an act" are admissible as res gestae, "remembering that immediateness is tested by closeness not of time but of causal relation." Wharton, op. cit. sec. 265.

The main act or transaction is not necessarily confined to a particular point of time but may extend over a longer or shorter period. Jones, op. cit., sec. 358. A transaction may include a series of occurrences extending over a period of time. 32 C.J.S., Evidence, sec. 408, sec. 411, note 88.

The general rule is well recognized that "where an offense is the termination of a continuous transaction, it is admissible to show the entire train of connected facts leading to, up to and forming part of the preparation for the commission of the offense, whether consisting of conduct, declarations, or other occurrences." *Sprinkle* v. *United States,* 141 Fed. 811 (4th Cir.).

Finally, it has often been noted that the tendency of the decisions has been to extend, rather than to narrow, the scope of the res gestae exception to the hearsay rule. *Insurance Co.* v. *Mosley,* 8 Wall. 397, 408; *Sprinkle* v. *United States, supra.*

Applying these principles to the *Wolcher* case, the "main fact" or "principal transaction" in this case embraces the whiskey purchases in the black market, the series of transactions lying between Wolcher's making the arrangement with Gersh for the objective of securing the whiskey and the final delivery of the whiskey to Wolcher, or more specifically to the licensed wholesaler distributing in accordance with Wolcher's directions.

Gersh's solicitations, negotiations and verbal agreements were actually part of his black market activities.

Plainly, too, Gersh's declarations that his arrangements were for the benefit of and for delivery to Wolcher, serve to characterize his role, and are part of the res gestae. They were not mere recitations of a past event for the possible purpose of advantage in litigation. They were an integral part of the current event, to induce Corriston to assist Gersh in making the arrangements. Similarly Gersh's declaration of receipt of cash from Wolcher was

part of the current event, to provide the necessary assurance that Gersh had the means of consummating the transaction.

3. There has been carved out of the res gestae decisions a special rule that declarations of an existing state of mind in the sense of an intent, plan or design to do an act are admissible to prove that the intent, plan or design was actually carried out, and that the declarant did the act. Wigmore, Evidence (3d ed.), sec. 1725. The leading case is *Mutual Life Ins. Co.* v. *Hillmon,* 145 U.S. 285 (1892), where the declaration was held admissible to prove that declarant together with another did an act in the future (go on a trip).

Gersh's declarations, taken together with the conversation with Taylor, the supplier of the black market whiskey, are evidence of his plan and design to have whiskey shipped to Wolcher on the West Coast and to pay a cash bonus in addition to the $10,000 deposit, for this purpose.

The authorities have often noted that the contemporaneous declarations that are part of the res gestae are likely to be more reliable even than the subsequent testimony of the declarant. Gersh's declarations to Corriston that explain the significance of his contemporaneous acts are not only admissible but may be looked to as more reliable than Gersh's subsequent testimony and explanation.

C. Corriston's testimony is admissible under the exception to the hearsay rule governing declarations of a co-conspirator.

Corriston's testimony is admissible under the rule establishing the admissibility of acts and declarations of co-conspirators. *United States* v. *Gooding,* 12 Wheat. 460 (1827); *Lutwak* v. *United States,* 344 U.S. 604, 617 (1953).

Wolcher's testimony as to his arrangements with Gersh plainly establishes a conspiracy to violate the law in paying over-ceiling prices for whiskey. Every act and declaration of Gersh in pursuance thereof is admissible in evidence

whether Wolcher was or was not present at the transactions.

Although the *Gooding* case announced the doctrine as one of agency, the Supreme Court soon thereafter held the rule applicable to the declarations of one who acted "in conjunction with" defendant. See *American Fur Co.* v. *United States,* 2 Pet. 358, 364-5 (1829):

> "The principle asserted in the decision of that point, and applied to the case was, that whatever an agent does, or says, in reference to the business in which he is at the time employed, and within the scope of his authority, is done or said by the principal; and may be proved, as well in a criminal as a civil case; in like manner as if the evidence applied personally to the principal.
>
> "The opinion of the court in the present case is not less correct, whether Davis was considered by the jury as having acted in conjunction with Wallace, or strictly as his agent. For we hold the law to be, that where two or more persons are associated together for the same illegal purpose, any act or declaration of one of the parties, in reference to the common object, and forming a part of the res gestae, may be given in evidence against the others; and this we understand, upon a fair interpretation of the opinion before us, to be the principle which was communicated to the jury."

In *Hitchman Co.* v. *Mitchell,* 245 U. S. 229, 249, the Supreme Court expressed the rule in terms of the conception that when persons "associate themselves together in the prosecution of a common plan or enterprise, lawful or unlawful, from the very act of association there arises a kind of partnership."

This Court has recently analyzed the position of aiders and abettors and co-conspirators and emphasized the elements of unlawful community of purpose and the least degree of concert where the parties are active partners in the criminal intent. *Cosgrove* v. *United States,* 224 F. 2d 146, 152 (9th Cir.).

The black market purchases of whiskey are a critical fact in this trial for income tax evasion. Wolcher and Gersh were "partners in crime" in regard to those black market purchases of whiskey. Wolcher having testified that he had arranged with Gersh to obtain whiskey for him, the Government could clearly have introduced Corriston's testimony in a trial of Wolcher for making, conspiring to make, or aiding and abetting, purchases of whiskey at prices above ceiling.

Corriston's testimony is likewise admissible to prove such black market violations although these are not merely an offense but are offered as a defense,—a defense to the charge of tax evasion.

So far as doctrines of agency are concerned, it is clear that declarations of an agent made in connection with a transaction are admissible in evidence as part of the res gestae, whether offered for or against the principal. 32 C.J.S. Evidence, sec. 410.

The Government argues that the declaration of a co-conspirator is only admissible in evidence *against* his co-conspirator. There might be some weight in this argument if the declarations were exculpatory and self-serving when made. But Gersh's declarations were not exculpatory or self-serving when made, and on the contrary were implicating, both as to Gersh and as to Wolcher.

The situation before this Court may be likened to that before the Supreme Court, when it came to consider whether the dying declaration exception could be invoked by the defendant as well as by the Government when the declarant was anticipating death although a substantial time period elapsed prior to death. The Court said simply that "no more rigorous rule" of evidence should be applied because the rule was to the defendant's advantage rather than the Government's. *Mattox* v. *United States,* 146 U.S. 140, 152 (1892).

It would offend justice and reason that appellant should be more circumscribed in proving his own guilt (of the other crime), his criminal associations and the activities of his criminal associates, than the Government would be if trying him for such crime.

D. The order is not one calling for affirmance as a ruling based on the exercise of discretion.

1. The ruling of the District Judge that the motion failed to set forth any "legal basis" for granting a new trial was based on a ruling that the Corriston evidence was inadmissible.

Although ordinarily the granting or denial of a motion for new trial rests in the sound discretion of the trial court and does not present a question for consideration by an appellate court, that rule does not apply where the District Judge denies the motion on the ground that the evidence tendered is not admissible. See *Mattox* v. *United States,* 146 U. S. 140, 147 (1892).

2. On motion for new trial, it is the duty of the trial judge, both to the parties and to the reviewing court, "to file a memorandum of the reasons for his action on the motion." *United States* v. *Walker,* 19 F. Supp. 969, 970 (W.D. Mo. 1937).

Otherwise, there is the danger of miscarriage of justice in that misconceptions, whether of fact or law, can not be remedied either by the District Judge himself, upon clarification by the parties, or by the appellate court. Or a ruling on a matter or law held contrary to the view of the appellate court, may be sustained on the assumption that it might have been rendered on a question of fact.

3. In the present case, there is no proper basis for an argument that the ruling should be sustained as an exercise of discretion. The District Judge did not purport to exercise his discretion on the facts, but rather, in effect,

sustained a demurrer to the motion as without a legal foundation.

As Justice Douglas stated in his opinion (Appendix) Corriston's evidence, if admissible, is "probative of a crucial fact issue in the case" and "might well tip the scales in defendant's favor, as it goes to the heart of the case."

Justice Douglas also stated (Appendix): "The district judge may have meant that the result of the prosecution would hardly have been different if the newly discovered evidence were admitted since his recollection was that there were large sums still unaccounted for on that theory of the case. As I read the record, there would be no sums unaccounted for if this defense were established." [6]

As stated above, the ruling of the District Judge rests upon an opinion as to the legal inadmissibility of the evidence tendered, which is fully reviewable by this Court.

II. THE DISTRICT JUDGE ERRED IN FAILING TO REQUIRE THE UNITED STATES ATTORNEY TO PRODUCE FOR EXAMINATION BY THE COURT ANY EVIDENCE IN HIS POSSESSION, THAT THE MONEY WOLCHER PAID TO GERSH WAS PASSED ON TO PEOPLE HIGH IN THE WHISKEY SYNDICATE, WHO HAD NO RELATION OR CONTACT WITH WOLCHER, NOTWITHSTANDING THE ASSERTION OF THE UNITED STATES ATTORNEY THAT SUCH EVIDENCE IN HIS POSSESSION IS NOT LEGALLY ADMISSIBLE.

(Specification of Error No. 2)

1. Mr. Chotiner's affidavit (R. 18) sets forth that in his conversation with Mr. Burke, the United States Attorney, Mr. Burke stated in substance: "We have evidence that the money Wolcher paid Gersh was passed on to people very high in the syndicate, who had no relation or contact with Wolcher, with very little, if any, of the money being retained by Gersh."

---

[6] Apparently Justice Douglas had reference to the colloquy at R. 57. It is indisputable as a matter of fact that the District Judge's recollection at the hearing, and Mr. Schnacke's statement, were inaccurate.

Mr. Chotiner's affidavit was based on the notes which he took in his hotel room immediately after his conversation with Mr. Burke (R. 45), and which are still in his possession.

The motion for new trial included a prayer that the United States Attorney be required to divulge all the evidence in the hands of the Government showing defendant's payments to Gersh and Gersh's payments to the syndicate. (R. 11, 12.) Defense counsel argued that at least the first step should be production for inspection by the District Judge (R. 50).

The motion for a new trial based on Chotiner's affidavit on its face purports to show that the United States Attorney had evidence showing over-ceiling payments by Wolcher to Gersh and by Gersh to persons in the whiskey syndicate. This statement in Chotiner's affidavit was not denied by the United States Attorney but he sought to avoid the legal effect of the same by his ipse dixit statement that the evidence he referred to was not legally admissible evidence. It was not for the United States Attorney to make a conclusive determination of the legal character or admissibility of any evidence he possessed. As said in the case of *Griffin* v. *United States,* 182 F. 2d 990, 993 (C.A. D.C.):

> "It would be unfair not to add that we have confidence in the good faith of the prosecution. Its opinion that evidence of the concealed knife was inadmissible was a reasonable opinion, which the District Court sustained and no court has overruled until today. However, the case emphasizes the necessity of disclosure by the prosecution of evidence that may reasonably be considered admissible and useful to the defense. When there is substantial room for doubt, the prosecution is not to decide for the court what is admissible or for the defense what is useful."

It was the duty of the trial court as requested in the motion for a new trial to take evidence for the purpose of

ascertaining whether the information in the hands of the United States Attorney would be legally admissible evidence at a new trial of the case. It was not for the United States Attorney to make a conclusive determination of this question.

In *United States* v. *Rutkin,* 212 F. 2d 641 (3d Cir.), the Court held that the prosecution must produce for inspection of the Court a statement obtained by the Government from a witness relative to the case which was not known to the defendant but which the defense claimed corroborated the defendant's testimony.

The *Rutkin* case involved a motion under 28 U.S.C. sec. 2255, based on denial of constitutional rights since time for filing motion for new trial had expired. *A fortiori* the same relief can be obtained for the new trial where time therefor has not expired.

Motion for new trial on the ground of newly discovered evidence may be based on evidence unknown to defendant which is in the Government's possession.

United States v. *Miller,* 61 F. Supp. 919 (S.D. N.Y. 1945).

2. Mr. Burke's affidavit sets forth that this information developed as a result of an investigation by agents of the Internal Revenue Service requested by Wolcher, and that the Government concluded that there was no legally admissible evidence warranting an indictment of Gersh for perjury although sufficient doubts had been raised of Gersh's reliability that it was decided not to call him as a witness (R. 20-21).

Mr. Burke then goes on to say that in his opinion defendant's counsel had substantially the same information concerning Gersh as did the Government. This opinion does not provide a foundation for resisting the application. Appellant did provide leads to the Government. Thus he provided an affidavit from Mr. Sugarman of Runyan Sales

Co. denying Gersh's testimony that it was he, Gersh, who originated the purchase of coin machines to send to Wolcher. Likewise appellant had called the attention of the Government to the fact that its own files show that Penn-Midland Company was selling whiskey in the black market, and particularly show a black market payment on a shipment from Penn-Midland to one Blumenthal, a shipment which arrived in San Francisco at the same time as Penn-Midland's shipment of 2,038 cases of Old Boston Rocking Chair whiskey to George Barton Co. which was acting as consignee of whiskey for Wolcher.

But defendant's leads in no way covered what Mr. Burke told Mr. Chotiner. Before he learned of Mr. Corriston's evidence, defendant had no leads either about Gersh's whiskey connections, or that the money which defendant paid Gersh was passed on to people high in the whiskey syndicate.

III. THE DISTRICT JUDGE ERRED IN FAILING TO SET FORTH FINDINGS OF FACT AND CONCLUSIONS OF LAW.

(Specification of Error No. 3)

Denial of a motion for new trial results in a final, appealable order. It is the duty of the District Judge to set forth his findings and conclusion, not necessarily in a formal array but in an informative memorandum or opinion. See page 24, *supra* (par. 2).

In this case there is no prejudice because it is clear in context that the ruling of the District Judge is based on the inadmissibility of the Corriston affidavit.

If the District Judge had intended to exercise his discretion, appellant would be denied a safeguard and the error would be prejudicial.

CONCLUSION

Appellant could not overcome the prosecution's telling argument that there was absolutely no corroboration of his testimony that he transferred funds to Gersh for the purpose of making purchases in the black market of the whiskey which was shipped to appellant.

Now corroboratory testimony is offered by this motion for new trial, testimony that, as Justice Douglas said, is "probative of that crucial fact issue. * * * If the evidence is admissible, it might well tip the scales in defendant's favor, as it goes to the heart of the case."

Neither doctrine, reason nor justice require the rejection of the evidence.

Appellant has been convicted of the OPA offense of which he is guilty, convicted on a plea of guilty. It would be beyond reason and justice that he should also be imprisoned for income tax evasion because the jury, which recommended leniency, had no opportunity to consider whether the new evidence would "tip the scales in defendant's favor" and raise a reasonable doubt as to whether he was guilty of tax evasion.

The order of the District Judge should be reversed.

Respectfully submitted,

Leo R. Friedman,
Harold Leventhal,
Attorneys for Appellant.

Dated, San Francisco, California,
January 17, 1956.

APPENDIX

SUPREME COURT OF THE UNITED STATES

No. —— October Term, 1955

LOUIS E. WOLCHER, *Appellant*,

v.

UNITED STATES OF AMERICA

APPLICATION FOR BAIL

[December 31, 1955]

Mr. Justice Douglas, Circuit Justice

Wolcher has been sentenced to two years' imprisonment and fined $10,000 on a judgment of conviction of federal income tax evasion. The judgment has been affirmed by the Court of Appeals. 218 F. 2d 505. A motion for a new trial based on newly discovered evidence was denied by the District Court and an appeal from that order is now pending in the Court of Appeals. The District Court and the Court of Appeals have denied bail pending that appeal. Wolcher now makes application for bail to me as Circuit Justice. Rule 46(a)(2) of the Rules of Criminal Procedure authorizes me to grant the application "only if it appears that the case involves substantial question which should be determined by the appellate court." See *Herzog* v. *United States*, 75 S. Ct. 349.

A trial judge's order denying a motion for a new trial on an appraisal of newly discovered evidence should remain undisturbed "except for most extraordinary circumstances." *United States* v. *Johnson*, 327 U.S. 106, 111. Nevertheless, after hearing oral argument and studying the record, I feel that the appeal raises "a substantial

question'' within the meaning of Rule 46(a)(2), if that Rule is given the liberal construction necessary to protect the right of appeal. See *Herzog* v. *United States, supra.*

The motion for a new trial was accompanied by an affidavit of one Corriston. He offered testimony which appears to be probative of a crucial fact issue in the case—whether Wolcher gave large sums of cash to one Gersh as over-ceiling payments for black market whiskey, thus violating one federal law but accounting for the disposition of the funds on which he failed to pay the income tax. If the district judge denied the motion because he considered the Corriston testimony to be of too little weight in the totality of the trial to justify a new trial, his judgment that a new trial was not ''required in the interest of justice'' within the meaning of Rule 33 of the Rules of Criminal Procedure, would be entitled to special deference. He stated that in his opinion the motion failed to set forth any ''legal basis'' for granting a new trial. The district judge may have meant that the result of the prosecution would hardly have been different if the newly discovered evidence were admitted since his recollection was that there were large sums still unaccounted for on that theory of the case. As I read the record, there would be no sums unaccounted for if this defense were established. The district judge may, on the other hand, have meant that the Corriston testimony was inadmissible, because it was hearsay. Counsel for Wolcher argue that the Corriston testimony would be admissible even though it was hearsay, because it relates to statements of Gersh made in furtherance of a conspiracy between Wolcher and Gersh to obtain black market whiskey—a novel suggestion since those statements would be made on behalf of the co-conspirator rather than against him. Yet it is claimed that the agency theory which admits the statement when it hurts the co-conspirator (see *Lutwak* v. *United States,* 344 U.S. 604, 617, and cases cited), likewise makes it admissible when it aids him. If, as appears to be the case, the denial of the motion for a

new trial by the district judge was at least in part a ruling on a point of evidence, a "novel" question, within the meaning of *Herzog* v. *United States, supra,* at 351, is presented. If the evidence is admissible, it might well tip the scales in defendant's favor, as it goes to the heart of the case. I express no opinion on the merits, but I consider the question of sufficient substance to grant this application for bail.

No. 14,919

IN THE

United States Court of Appeals

For the Ninth Circuit

LOUIS E. WOLCHER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR THE UNITED STATES.

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Attorneys for Appellee.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

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No. 14,919

IN THE

United States Court of Appeals

For the Ninth Circuit

LOUIS E. WOLCHER,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR THE UNITED STATES.

JURISDICTIONAL STATEMENT.

An indictment was returned against appellant, Louis E. Wolcher, on October 4, 1950 in the Southern Division of the Northern District of California, charging him, in one count, with wilfully and knowingly attempting to evade and defeat income taxes due and owing for the tax year ended June 30, 1944, in the amount of $30,949.81, in violation of Section 145(b), Internal Revenue Code of 1939.

On January 18, 1951 appellant entered a plea of not guilty. A trial was held, and on May 4, 1951 the jury returned a verdict finding the appellant guilty as charged. The conviction was reversed by

this court on November 17, 1952, *Wolcher v. United States,* 200 F. 2d 493.

Thereafter appellant was retried before the Honorable Louis E. Goodman on August 31, 1953 and the jury again returned a verdict of guilty. The conviction was affirmed by this court, *Wolcher v. United States,* 218 F. 2d 505 and petition for certiorari was denied by the Supreme Court of the United States, 350 U.S. 822.

On September 2, 1955 appellant moved the District Court for a new trial on grounds of newly discovered evidence. The motion was denied and this appeal is from the order of denial. A timely notice of appeal was filed and it is conceded that this court has jurisdiction to hear and decide the appeal.

STATEMENT OF FACTS.

A.- General background.

The evidence at the second trial of this case disclosed that during the fiscal year ended June 30, 1944 appellant Wolcher was the sole owner of a coin operated machine business, and in addition, had partnership interests, in varying percentages, in a number of other businesses including several bars.

During the last half of 1943 he engaged in transactions involving some 5138 cases of whiskey, a commodity then in very short supply, and capable of commanding a price far above the ceiling price imposed by law. By arrangement between appellant and two

licensed liquor wholesalers in San Francisco, some 1174 cases (or less) of the whiskey were sold by the wholesalers to various persons at ceiling prices. In these transactions the purchasers paid the wholesalers directly and received delivery of the whiskey from the wholesalers. Appellant did not appear in these transactions.

Some 200 cases of the whiskey were not sold during the tax year involved here and remained in appellant's inventory at the end of that year.

All the rest of the whiskey was sold by appellant on the black market. Exactly how many cases were so sold cannot be determined, but it is certain that at least 3764 cases were sold at over-ceiling prices.[1]

In accomplishing these black market sales, appellant and his agents charged prices of $72.40 a case for 300 cases, $55.00 a case for 68 cases, and $60.00 a case for the balance. The pattern of these sales was to require the buyer to pay the invoice, or ceiling, price (which averaged about $32.60 per case) by a check payable, and later delivered, to the licensed wholesaler. The balance was required to be paid in cash, and was received by appellant. None of the cash money received by him on these transactions was deposited in any of his bank accounts, no record of it was retained, no record of the sales was made on any of appellant's books of account, and none of

[1]There may have been more, since at the second trial of the case, appellant testified that 1174 cases had been sold at ceiling prices, whereas at the first trial he thought it was only about 900 cases sold at ceiling prices.

the profit on the transactions was included in his income as reported on his income tax return.

Appellant's defense was that he made no profit on these transactions because he had sent all of the cash he received to one William Gersh as a bonus for locating the whiskey. Gersh was not a witness at the second trial of the case although he had been at the first trial, where he denied receiving any money from appellant for the purpose of obtaining whiskey. At the first trial one Francis Mayer testified (pp. 402-407, Transcript of record, first trial, No. 12992) that he had shipped to the wholesaler in San Francisco 1,000 cases of the whiskey ultimately sold by appellant and that these shipments followed a conversation he had with Gersh. Mayer was subpoenaed as a defense witness for the second trial but was not called, nor was his testimony from the first trial introduced in evidence even though Government counsel offered to stipulate that it might be (pp. 455-456, Transcript of Record, second trial, No. 14109).

B. The motion for new trial.

Just within two years after the date of final judgment, appellant moved for a new trial on the ground of newly discovered evidence, pursuant to Rule 33, Federal Rules of Criminal Procedure. The motion was supported by two affidavits, one of Edwin F. Corriston and the other of Murray M. Chotiner. Corriston's affidavit, which related certain conversations he allegedly had with William Gersh and with one Garry Taylor, may be summarized as follows:

At the first conversation, in the spring of 1943, Gersh said that he had been in touch with Wolcher, that Wolcher and some taverns on the west coast, that Wolcher was having difficulty obtaining whiskey, that Gersh had received cash from Wolcher for the purpose of making over-ceiling payments to obtain whiskey, that Gersh didn't know where to get whiskey and that Gersh desired Corriston to get a quantity of whiskey for Wolcher. During the course of this conversation Gersh exhibited a wad of hundred dollar bills. Corriston told Gersh that he believed he might be of help, and he called Gersh back a few days later and told him to contact Frank Mayer and that Mayer would be expecting to hear from him.

During the summer Gersh told Corriston the contact was working out well. Some months thereafter there was a further conversation in which Gersh said that the previous contact petered out, that Wolcher needed more whiskey, and that he would again appreciate Corriston's help. A few days later Corriston told Gersh to contact a Garry Taylor, who, in a later conversation between Corriston and Taylor, said that $50,000 cash would be needed. Thereafter Corriston had a further conversation with Gersh in which Gersh said he had received plenty of cash from Wolcher.

Thereafter, there was a conversation between Taylor, Gersh and Corriston in which Taylor again demanded $50,000, and in which Gersh said he had the money. Taylor asked for $10,000 and Gersh handed Taylor an envelope which he said contained "ten big ones." Thereafter, in separate conversations, Taylor told Corriston that every-

thing was okeh and Gersh told him it was a very good contact.

The affidavit of Murray M. Chotiner relates a conversation with the United States Attorney for the Northern District of California, who was alleged to have said, after the second trial, "We have evidence that the money Wolcher paid to Gersh was passed on to people very high in the syndicate, who had no relation or contact with Wolcher, with very little, if any, of the money being retained by Gersh."

In a counter-affidavit the United States Attorney stated that he had numerous conversations with various attorneys for appellant, including a conversation with Chotiner; that he has no recollection of the exact words used during his conversation with Chotiner, but that he did not intend to convey, nor did he believe that he did convey, the impression that there was any evidence concerning the relationship between Wolcher and Gersh that was not known to the defense, although he had been aware of, and had undoubtedly referred to, the suspicions, rumors, and speculations concerning Gersh which he had frequently discussed with Mr. Leo Friedman and with other representatives of the defense.

The United States Attorney affirms that he has no knowledge of any evidence, other than the testimony adduced at the trial, to the effect that Gersh was engaged in black market liquor transactions, or to the effect that Wolcher made any payments to Gersh for the purpose of acquiring black market liquor.

The United States Attorney's affidavit was not controverted.

QUESTION PRESENTED IN THIS CASE.

The only question presented on this appeal is whether or not the District Judge abused his discretion in denying appellant's motion for a new trial on the ground of newly discovered evidence.

ARGUMENT.

THE DISTRICT JUDGE RULED CORRECTLY THAT THERE WAS NO LEGAL BASIS FOR GRANTING A NEW TRIAL.

The District Court order denying motion for a new trial, dated September 12, 1955, reads as follows:

> "The motion of defendant for a new trial on the ground of newly discovered evidence, filed herein on September 2, 1955, supported by affidavits of Edwin M. Corriston and Murray M. Chotiner and argued and submitted to the court, in my opinion, fails to set forth any legal basis for granting a new trial to the defendant on the ground of newly discovered evidence.
>
> Consequently, the motion for a new trial is hereby denied."

It is well settled that a motion for new trial based on allegedly newly discovered evidence is directed to the discretion of the trial judge and is reviewable only for manifest abuse.

Balestreri v. United States, 9th Cir. 1955, 224 F. 2d 915;

United States v. Hack, 7th Cir. 1953, 205 F. 2d 723, cert. den., 346 U.S. 875;

Grover v. United States, 9th Cir. 1950, 183 F. 2d 650;
United States v. Cordo, 2d Cir. 1951, 186 F. 2d 144, cert. den., 340 U.S. 952.

The reviewing court must assume that the trial judge, in denying a motion for new trial on such grounds, found the facts against the accused. *Jefferies v. United States,* 9th Cir. 1954, 215 F. 2d 225.

The Supreme Court has warned that courts must be on the alert to see that the motion for new trial on the ground of newly discovered evidence be not abused. *United States v. Johnson,* 1946, 327 U.S. 106, reh. den., 327 U.S. 817. Accordingly, the burden upon the moving party is a formidable one. He must satisfy the trial court that there is new evidence, that it came to his attention after the trial, that his failure to learn about it sooner was not due to any want of diligence, that the evidence is material to the issues involved, that it is of such a nature that it would probably produce an acquittal, and that it is not merely cumulative or impeaching. *United States v. Johnson,* 7th Cir. 1944, 142 F. 2d 588, cert. dism., 323 U.S. 806; *Balestreri v. United States,* supra; *Weiss v. United States,* 5th Cir. 1941, 122 F. 2d 675, cert. den., 314 U.S. 687, reh. den., 314 U.S. 716; *Wagner v. United States,* 9th Cir. 1941, 118 F. 2d 801, cert. den., 314 U.S. 622, reh. den., 314 U.S. 713. The heavy burden imposed upon the movant makes it clear that new trials on ground of newly discovered evidence are not favored in the law. *Casey v. United States,* 9th Cir. 1927, 20 F. 2d 752, affirmed 276 U.S. 413.

A. THE MOTION FOR NEW TRIAL WAS NOT DENIED ON THE GROUND THAT THE EVIDENCE TENDERED WAS NOT ADMISSIBLE, NOR ON ANY NARROW GROUND.

Appellant concedes that ordinarily the granting or denial of a motion for new trial rests in the sound discretion of the trial court, and will be reviewed only for abuse of such discretion. Appellant contends, however, that in the present case the District Judge based his denial upon the inadmissibility of the Corriston affidavit, and, therefore, that he, in effect, failed to exercise his discretion.

The record completely fails to support appellant's construction of the basis of the ruling by the District Judge. A reading of the order denying motion for a new trial not only fails to show the exclusion from consideration of either of the affidavits, but affirmatively shows that the District Judge considered the motion to be "supported by affidavits of Edwin M. Corriston and Murray M. Chotiner." Nowhere in the order, nor in any of the court's comments during argument, can there be found the slightest suggestion that the court intended to disregard any of the showing made by the moving party. Appellant simply failed to convince the trial judge that he was entitled to a new trial under the law. As the trial judge said (R. 57), "You cannot treat a motion for a new trial in the abstract. It has to be something that is related to the evidence in the case." See also *Balestreri v. United States,* supra, where this court said, at page 917, "The trial judge, in determining the impact of the newly discovered evidence, may utilize the knowledge he gained from presiding at the trial

as well as the showing on the motion." It cannot be presumed that the District Judge did otherwise here.

It seems clear that the court was satisfied, in the light of the evidence adduced at the trial, that the so-called newly discovered evidence, even if it were not cumulative, even if it were admissible, and even if it were newly discovered, was not so material that it would probably produce a verdict for the defendant were the case to be retried.

There is no requirement that the District Judge set forth his findings and conclusions in any formal type of memorandum. No such duty is imposed by any rule, nor has it been suggested by any Appellate Court. In the case of *United States v. Walker,* 19 F. Supp. 969 (W.D. Mo. 1937), the District Court Judge was not attempting, nor did he presume to have the power, to establish a new procedural rule for motions of this type. He simply expressed his personal belief that such a memorandum was desirable. It is interesting to note that, despite his belief, he disposed of the 74 grounds upon which the motion for new trial was based in very broad and inclusive terms, and in a very short memorandum.

That appellant failed to apply to the District Judge for any clarification or amplification of the order denying motion for a new trial makes it plain the order needed no clarification. The District Judge was simply not convinced that a new trial was justified. When the newly discovered evidence, so-called, is examined it is plain that the motion should have

been denied, whether or not for the reasons the trial judge had in mind. A judgment need not be affirmed solely upon the ground that seemed controlling to the lower court. *Wagner v. United States,* 9th Cir. 1933, 67 F. 2d 656, 657.

B. THE CORRISTON TESTIMONY IS NOT ADMISSIBLE.

Corriston, in his affidavit, related a number of conversations he had with William Gersh, during the course of which Gersh told Corriston that Wolcher wanted to get black market whiskey, that Wolcher had sent Gersh money to obtain such whiskey, and that Gersh had in fact obtained whiskey for Wolcher with the money Wolcher sent. Appellant contends that Corriston might testify to these extra-judicial declarations by Gersh, who was not a witness at the most recent trial of the case, under either of two exceptions to the hearsay rule, first, as declarations constituting a part of the *res gestae*, or second, as declarations of a co-conspirator. Neither ground is tenable.

1. The Gersh declarations recounted by Corriston are not admissible as part of the res gestae.

The theory of the so-called *res gestae* exception to the hearsay rule is plainly set forth in *Wigmore on Evidence,* 3rd Ed., Vol. VI, Section 1776, p. 177:

> "The true nature of the hearsay rule is nowhere better illustrated and emphasized than in those cases which fall outside the scope of its

> prohibition. The essence of the hearsay rule is the distinction between the testimonial (or assertive) use of human utterances and their non-testimonial use.
>
> The theory of the hearsay rule is that, when a human utterance is offered as evidence of the truth of the fact asserted in it, the credit of the asserter becomes the basis of our inference, and therefore the assertion can be received only when made upon the stand, subject to the test of cross-examination. If, therefore, an extra-judicial utterance is offered, not as an assertion to evidence the matter asserted, but *without reference to the truth of the matter asserted,* the hearsay rule does not apply." (Emphasis in the original.)

It is plain, then, that the condition precedent to the application of the *res gestae* rule is that the declarations to be admissible must be offered to establish only that the words were spoken by the declarant. The rule does not apply where the declaration is offered to establish the truth of what the declarant said, and in such a case the declarations are not admissible.

If the declarations of Gersh, as recited by Corriston, are considered "without reference to the truth of the matter asserted," the words are neither relevant nor material to any issue in the present case. It is only because of Gersh's narration of past events that any relationship to appellant is revealed. The testimony is offered to establish the very facts that Gersh recited: that Wolcher was having difficulty in

obtaining whiskey, that he asked Gersh to get the whiskey, and that he sent money to Wolcher for that purpose. The mere fact that the words were spoken has no probative value in this case. The declarations are probative only if it be assumed that Gersh spoke truthfully when he connected Wolcher to his supposed liquor transactions, but the assumption of truthfulness is an assumption that cannot be made without violation of the hearsay rule.

If there were any such arrangements as the Corriston affidavit suggests, whether between Wolcher and Gersh, or Wolcher and Mayer, or Wolcher and Taylor, or any arrangements between Gersh, Mayer or Taylor relating to Wolcher, they could be, as in fact they were in two cases, described by the direct testimony of the participants. But Corriston is not a participant, and he has knowledge only of what others have said about these arrangements. The existence of such arrangements cannot be established by hearsay declarations.

2. Declarations of one co-conspirator are not admissible in favor of another.

Appellant next contends that the declarations of Gersh, overheard by Corriston and referred to in the Corriston affidavit, are admissible as the declarations of a co-conspirator. The theory is that appellant and Gersh were engaged in an unlawful conspiracy to violate the price control laws and, accordingly, that the extra-judicial declarations of Gersh should be admitted in evidence *in favor of appellant* under the

rule that permits the acts and declarations of one co-conspirator to be used *against* another.

This theory indicates a misunderstanding of the principles of law which permit the use in evidence against a defendant of the acts or declarations of his co-conspirator.

The acts and declarations of co-conspirators amount to nothing more than admissions by the defendant or by persons with a certain privity of interest with him. *Wigmore on Evidence,* 3rd Ed., Vol. IV, Sec. 1069, pp. 68-69. These vicarious admissions stand in no different light, and are receivable on no different basis, than the admissions of the defendant himself.

The point of reference in determining the admissibility of such vicarious admissions is not the co-conspirator who made the statement but rather the defendant himself. If, for the purpose offered, the act or declaration, if made by the defendant, would be hearsay or self-serving, it must be held to be the same when made by another person in privity with him. On the other hand, if it would be admitted had it been made by the defendant, as in the case of an admission by him, then it will equally be admitted when made by his co-conspirator.

The mere fact that the statement, when made, may have been against the interest of the declarant is no ground for permitting it to be introduced in evidence. For example, the confession of guilt of a crime is against the interest of the declarant. But it has long been the law that a defendant may not introduce, in

his defense, the extra-judicial declaration of a third party confessing exclusive guilt for the very crime of which the defendant is accused.

Donnelly v. United States, 1913, 228 U.S. 243, reh. den., 228 U.S. 708;

Smith v. United States, 4th Cir. 1939, 106 F. 2d 726;

United States v. Mulholland, (D.C. Ky. 1892), 50 Fed. 413.

And it is logical that this should be so. The presumption of verity which surrounds admissions or vicarious admissions offered against the defendant in any particular case, is totally absent in cases where such admissions are offered on the defendant's behalf. The possibilities of collusion and the manufacture of so-called "declarations against interest" relating to crimes upon which the statute of limitations has run, or for which the declarant cannot be punished, are obvious.

Nor does *Mattox v. United States,* 1892, 146 U.S. 140 support appellant's position. The court there was not, as appellant suggests, considering whether a dying declaration could be offered by the defendant as well as by the Government, but rather was considering whether the particular dying declaration was admissible at all. It has never been questioned that dying declarations are a type of evidence that are receivable in evidence regardless of by whom offered. That this has always been the rule is indicated in the *Mattox* case at page 151 and by the cases there cited.

Appellant is not here asking that "no more rigorous rule" of evidence be applied to him than to any other litigant, but is rather asking that a completely new and illogical rule of evidence be especially designed for him to permit him to introduce evidence which contravenes the hearsay rule. Appellant is not the first litigant to make this request. It was tried before in *Nothaf v. State,* 91 Tex. Cr. Report 378, 239 S.W. 215. There, as here, a motion was made for a new trial on grounds of newly discovered evidence, and, quite properly, the court held that the proffered evidence was inadmissible because declarations of an alleged accomplice are not admissible as original evidence in favor of the accused.

Professor Wigmore disposes of the appellant's contentions (Vol. IV, Section 1049, p. 6), where he says:

> "The use of Admissions, is on principle not obnoxious to the Hearsay rule; for the reasons above stated in Section 1048.
>
> Nevertheless, because most statements used as admissions do happen to state facts against interest, judges have been found who were misled by this casual feature and treated admissions in general as obnoxious to the Hearsay rule, and therefore as entering only under an exception to that rule.
>
> That this is a mere local error of theory and in no sense represents a rule anywhere obtaining may be seen from three circumstances: first, that the limitations of the Hearsay exception to facts against pecuniary or proprietary interests have never been attempted to be applied to admissions; secondly, that the further requirement of the

> Hearsay exception, namely that the declarant must first be accounted for as deceased, absent from the jurisdiction, or otherwise unavailable, has never been enforced for the use of a party's admissions; and thirdly, that *if an opponent's Admissions fell under the protection of that Exception, they would be equally admissible in his favor; but of course they are not.*" (Emphasis added.)

C. THERE IS NO NEW EVIDENCE.

Even if it were thought that the affidavit of Corriston related to testimony which might be admissible at a third trial of this case, it nonetheless would not constitute such "newly discovered evidence" as would have justified the granting of the motion for a new trial.

In an attempt to establish the Corriston testimony as newly discovered, appellant, in his motion for a new trial, set forth (R. 11) that he "had no inkling that Mr. Corriston was involved in this matter in any way." But there is no materiality in the involvement of Corriston or in appellant's knowledge of it.

It is highly significant that appellant failed to allege in any of his moving papers that he was unaware of the transactions Gersh was talking about in his declarations to Corriston, or that he was unaware of the existence and material activities of Gersh, or of Frank Mayer, or of Garry Taylor, the persons referred to in the Corriston affidavit.

Appellant could not make any such allegation because the record affirmatively shows that he was

aware of the existence of at least two of them, both of whom testified at the first trial of the case. Gersh appeared as a witness at the first trial of the case, but was not called at the second trial. Frank Mayer also appeared as a witness at the first trial, was called by appellant as a witness at the second trial, but was not produced, nor was his testimony introduced in evidence, despite the fact that the prosecuting attorney offered to stipulate that Mayer's testimony from the first trial could be read into the record at the second trial.

At the first trial Mayer had testified that certain shipments of whiskey, totaling 1,000 cases, which had been distributed by a San Francisco wholesaler in accordance with appellant's instructions, had been sent to the wholesaler by Mayer and that this shipment resulted from a conversation he had with one Bill Gersh (pp. 404-407 Transcript of Record at first trial, No. 12992).

It is not correct, then, to state, as appellant does (App. Op. Br. p. 16), that Corriston "makes available for the first time" evidence which corroborates the testimony of appellant that Gersh participated in obtaining black market whiskey for him. Corroboration was available, certainly from Mayer and presumably from Taylor. Appellant, for purposes of his own, chose not to use it.

It cannot be the law that a defendant may withhold direct evidence of a fact at the time of trial and then obtain a new trial because he later discovers secondary evidence of the same fact.

The evidence now offered as "new" is merely indirect, secondary, and hearsay testimony which would be cumulative and to the same effect as direct, competent testimony which was available to appellant at the time of trial.

D. THE "NEW" EVIDENCE IS NOT SUFFICIENT, EVEN IF BELIEVED OR ADMISSIBLE, TO MAKE AN ACQUITTAL PROBABLE.

In the fall of 1943 price and production controls made necessary by World War II drastically reduced the amount of available liquor. Appellant who had direct, or indirect, relationships with numerous bar owners by virtue of the pinball and slot machine business he had operated for many years, found himself with some 5,138 cases of whiskey available for disposal. At least 3,764 cases of this whiskey were sold by appellant through his agents at prices far in excess of both the price permitted by law and the price for which appellant was billed by the wholesalers through whom he acquired the whiskey. Whiskey brought almost any price demanded for it in the black market. Purchaser after purchaser testified that he had not even asked what the price would be because he was anxious to get the whiskey at any price. Appellant admitted handling the whiskey, admitted selling it on the black market, admitted receiving over $228,000 for the liquor he sold on the black market, and admitted that none of these transactions was reflected in the books or records in any of his businesses, nor upon his tax return. His defense was that he did not make

a profit on these transactions, and, furthermore, that he at no time intended to make a profit, which was intended to explain his failure to keep the records that would have reflected whether a profit was or was not in fact made.

Is it at all surprising that two juries, without a dissenting vote, have found this defense to be inherently improbable? The suggestion that a shrewd, hard-headed, experienced business man of appellant's type would engage in so extensive illegal dealing in a commodity so widely demanded at any price the seller chose to assess, without the intention of making a profit, and without in fact making a substantial profit, is simply more than a jury can swallow.

The jury was well aware, from the evidence of witness after witness, that liquor was much in demand. This evidence, plus the testimony of appellant and the strenuous argument of appellant's counsel, made the jury fully aware of the likelihood that appellant could not have obtained such a quantity of whiskey without having made some arrangements, financial or otherwise, with someone. Whether or not the arrangements were with Gersh and whether or not *some* payments were made was not the controlling question. Appellant confessedly had evaded substantial taxes unless he paid out *the entire amount* of the profit he made on the black market transactions. The evidence is equivocal, to say the least, on the points of whether any money was paid, or whether any was paid to Gersh, but that *all* of the money was paid out is simply unbelievable. The character of appellant, the

nature of his regular business, the extent and dangers of the black market liquor transactions, the concealment inherent in demanding payment by check plus cash, and the lack of any supporting records, all lead inescapably to but one conclusion, that appellant made a substantial profit on these illicit transactions.

There is nothing in the so-called "newly discovered evidence" now being tendered by appellant that bears in any way upon this logical inference. The proffered evidence gives no clue as to the total amount appellant was required to pay if, in fact, he was required to pay anything. It fails completely to meet the basic evidence of guilt, that profit could have been the only motive for these widespread illegal activities.

And even assuming the truth of the defense evidence, which was to the effect that bonuses of $20.00 per case were paid upon the first four lots of whiskey appellant obtained, and that bonuses of $25.00 a case were paid on the last three lots, it would appear that appellant made and failed to report a profit of some $17,406.71. The computation of this profit is set forth in the appendix.

Appellant has never contended that the evidence against him was insufficient for conviction, nor could he so contend with any logic. The case against appellant is such that it is extremely unlikely that any jury could arrive at a conclusion different from that of the first two juries who have heard it. Even if the testimony of Corriston were deemed to be admissible, there is nothing about it so fundamental as to

make it seem probable that appellant would be acquitted on a retrial. On the contrary, the Corriston testimony relates only to the activities of others. It was for his own activities and the reasonable inferences to be drawn from them, that the appellant was convicted. Nothing Corriston could testify to can change that.

E. THE CHOTINER AFFIDAVIT NEITHER JUSTIFIED THE GRANTING OF A NEW TRIAL NOR REQUIRED THE DISTRICT JUDGE TO DIRECT THE UNITED STATES ATTORNEY TO PRODUCE HIS FILES FOR EXAMINATION.

Appellant filed, with his motion for new trial, an affidavit of Murray M. Chotiner. According to this affidavit the United States Attorney made the statement, after the second trial of appellant, that he had evidence that Gersh had received money from appellant which he had "passed on to people very high in the syndicate." The United States Attorney's answering affidavit states that he had knowledge of nothing more than suspicions, rumors and speculations concerning Gersh and that he had spoken about these matters not only to Chotiner after the second trial, but, on a number of occasions, about the same matters to other attorneys for appellant during the period between the first and second trials. As a result of these conversations, and, because of the arguments of appellant's counsel that William Gersh had testified falsely, the United States undertook to conduct an investigation to find whether or not evidence could

be discovered sufficient to justify a charge of perjury against Gersh. While the investigation disclosed certain rumors and speculation, it produced no evidence to show that Gersh had perjured himself. The affidavit of the United States Attorney continues with the following statements:

> "I did not then, nor do I now, have knowledge of any evidence, in the legal sense, other than the testimony adduced at the trials, to the effect that Mr. Gersh was engaged in black market liquor transactions. It was and is my opinion that during my conversation with Mr. Chotiner, and during my earlier conversations with Mr. Friedman and other representatives of the defendant, defendant's counsel had substantially the same information concerning suspicions, rumors, and speculations concerning Mr. Gersh as had the government, and that the government and defendant's representatives were lacking in any additional tangible or legally admissible evidence connecting Mr. Gersh with black market liquor activities.
>
> It has never been suggested to me by counsel for the defense, nor has it come to my knowledge in any way, that there is available evidence of any kind, except the defendant Wolcher's testimony, to establish that Mr. Wolcher made any payments to Mr. Gersh for the purpose of acquiring black market liquor."

These averments of the United States Attorney are uncontroverted.

Appellant does not now contend that the Chotiner affidavit constituted a sufficient showing to justify the

granting of the motion for a new trial. It is plain that it does not since, at best it merely suggests the possibility that there may be some additional evidence, but fails to set forth what it might be or what importance it might have.

Standing uncontroverted the Chotiner affidavit might well have justified an order by the court requiring the production of any evidence which the United States Attorney had in his possession that might have demonstrated the activities of appellant or of Gersh in their dealings with black market whiskey.

But the affidavit is controverted by the affidavit of the United States Attorney, which makes it clear, first, that he had advised other counsel for appellant before the time of the second trial of exactly the same matters that he had related to Chotiner after the second trial and second, and most important, makes it clear that he has no more information concerning the suspicions, rumors, and speculations about Gersh than do the attorneys for appellant, and that he has no knowledge of any available evidence of any kind, except the appellant's own testimony, to establish that appellant made any payments to Gersh for the purpose of acquiring black market liquor.

With these averments of the United States Attorney uncontroverted, the trial judge had no alternative but to accept as the fact that there simply was no evidence in the possession of the United States Attorney that might be reached by an order to produce and, accordingly, that such an order would be an idle gesture.

The situation here is the converse of the situation in *United States v. Rutkin,* 3rd Cir. 1954, 212 F. 2d 641, where on a motion under 28 U.S.C. § 2255 the defendant produced an affidavit alleging that the Government had in its possession certain contradictory statements of witnesses who had appeared in the trial. The defendant's motion there was disposed of without any showing by the United States Attorney as to whether or not such statements existed and the Court of Appeals simply remanded the matter with instructions to issue an order that such statements be produced "if such exist". The situation was much the same in *Griffin v. United States,* C.A.D.C., 1950, 183 F. 2d 990.

But the situation in the present case is entirely different. Here, the District Judge sitting as the trier of the fact, can only have found, on the uncontroverted affidavit of the United States Attorney, that the fact is that the thing demanded to be produced does not exist. The findings by the trial court on conflicting evidence on such a motion must remain undisturbed on appeal, except under most extraordinary circumstances, which do not exist here. *United States v. Troche,* 2d Cir. 1954, 213 F. 2d 401.

It must be remembered, too, that the Chotiner affidavit relates exclusively to the supposed relationship between the appellant and Gersh and touches in no way upon the Government's basic contention which was that it is impossible to believe that the appellant would have engaged in such extensive black market transactions in the manner in which he did, thus

exposing himself to danger of prosecution, unless those transactions had been profitable to him.

CONCLUSION.

As was said by this court in *Balestreri v. United States,* supra, at p. 918, "The motion for new trial was addressed to the sound discretion of the trial judge, and it thus being 'manifest the trial court did not act arbitrarily or capriciously nor upon any erroneous concept of the law, the Appellate Court may not substitute its judgment for that of the trial judge' *Gage v. United States,* 9th Cir. 1948, 167 F. 2d 122, 125."

The order denying the motion for new trial should be affirmed.

Dated, San Francisco, California,
February 16, 1956.

Respectfully submitted,

LLOYD H. BURKE,
United States Attorney,

ROBERT H. SCHNACKE,
Assistant United States Attorney,

Attorneys for Appellee.

(Appendix Follows.)

Appendix.

COMPUTATION OF PROFIT TO DOUGLAS E. THOMAS ON WHISKEY
SALES DURING YEAR ENDING 6-30-44, ASSUMING
ALLEGED "BONUSES" ACTUALLY PAID

May, 1943

Old Brook Whiskey, from Hathjen
(500 cases purchased, 300 cases sold during year ending June 30, 1944)

Received from Sales:			
300 cs @ 72.40			21720.00
Alleged Cost:			
Per invoice*			
300 cs @ 51.90		15570.00	
"Bonus"			
300 cs @ 20.00		6000.00	
Total			21570.00
Profit			150.00

July, 1943

Bourbon Supreme Whiskey from Mayer via Francisco Distributing Co.

Total sold by Francisco	100 cs		
Sold by Francisco at ceiling price	32 cs		
Balance resold by Wolcher on black market	68 cs		
Received from Sales:			
68 cs @ 55.00			3740.00
Alleged Cost:			
Per invoice			
68 cs @ 33.35		2267.80	
"Bonus"			
68 cs @ 20.00		1360.00	
Total			3627.80
Profit			112.20

August, 1943

Schenley Whiskey from Mayer via Francisco Distributing Co.

Total sold by Francisco	500 cs		
Sold by Francisco at ceiling price	165 cs		
Balance resold by Wolcher on black market	335 cs		
Received from Sales:			
335 cs @ 60.00			20100.00
Alleged Cost:			
Per invoice			
335 cs @ 38.23		12807.05	
"Bonus"			
335 cs @ 20.00		6700.00	
Total			19507.05
Profit			592.95

September, 1943

Golden Wedding Whiskey from Mayer via Francisco Distributing Co.

Total sold by Francisco	500 cs		
Sold by Francisco at ceiling price	50 cs		
Balance resold by Wolcher on black market	450 cs		
Received from Sales:			
450 cs @ 60.00			27000.00
Alleged Cost:			
Per invoice			
450 cs @ 34.50		15525.00	
"Bonus"			
450 cs @ 20.00		9000.00	
Total			24525.00
Profit			2475.00

*Invoice price in all cases includes freight, etc.

Total Profit forward . . 3330.15

Total Profit brt. forward . . 3

October, 1943

Gallagher & Burton Whiskey from Galsworthy via Francisco Distributing Co.

Total sold by Francisco	1000 cs		
Sold by Francisco at ceiling price	185 cs		
Balance resold by Wolcher on black market	815 cs		
Received from Sales:			
815 cs @ 60.00 (less 500.00 commission paid)			48400.00
Alleged Cost:			
Per invoice			
500 cs @ 30.50		15250.00	
315 cs @ 37.80		11907.00	
"Bonus"			
815 cs @ 25.00		20375.00	
Total			47532.00
Profit			8

November, 1943

Gallagher & Burton Whiskey from J & J Distributing Co. via Geo. Barton Co.

Total sold by Barton	500 cs		
Sold by Barton at ceiling price	136 cs		
Balance resold by Wolcher on black market	364 cs		
Received from Sales:			
364 cs @ 60.00			21840.00
Alleged Cost:			
Per invoice			
364 cs @ 30.50		11102.00	
"Bonus"			
364 cs @ 25.00		9100.00	
Total			20202.00
Profit			16

December, 1943

Rocking Chair Whiskey, from Penn-Midland Co., via Geo. Barton Co.

Total sold by Barton	2038 cs		
Sold by Barton at ceiling price	606 cs		
Balance resold by Wolcher on black market	1432 cs		
Received from Sales:			
1432 cs @ 60.00			85920.00
Alleged Cost:			
Per invoice			
1432 cs @ 26.92		38549.44	
"Bonus"			
1432 cs @ 25.00		35800.00	
Total			74349.44
Profit			11

Total Profit, Whiskey Sales 17

No. 14,919

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LOUIS E. WOLCHER, *Appellant*

v.

UNITED STATES OF AMERICA, *Appellee.*

APPELLANT'S CLOSING BRIEF

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IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 14,919

LOUIS E. WOLCHER, *Appellant*

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UNITED STATES OF AMERICA, *Appellee.*

APPELLANT'S CLOSING BRIEF

ARGUMENT*

The newly discovered evidence corroborates the otherwise unsupported testimony of appellant on the issue that he made payments to Gersh to obtain whiskey in the black market.

Its significance is plain. In Justice Douglas' words, "it goes to the heart of the case." The jury recommended leniency even when appellant's testimony was uncorroborated. There is every reason to expect that the newly discovered evidence would at least raise a reasonable doubt of guilt.

The Government argues that appellant has not made a showing of the existence of any legally admissible testi-

* Appellant takes issue with various points made in the Government's restatement of the facts at pages 2-4 of the Government brief. For convenience, the points appellant disputes are discussed at the appropriate places in the argument below.

mony corroborating appellant — that Corriston's testimony is legally inadmissible, and that United States Attorney Burke denies that the evidence in his possession is legally admissible.

If these contentions are sound, the District Judge was correct in ruling (R. 26) that the motion, with supporting affidavits, "fails to set forth any legal basis for granting a new trial to the defendant on the ground of newly discovered evidence."

Appellant submits that the District Judge erred and that these contentions are not sound, that Mr. Corriston's testimony is legally admissible, and that it is for the court and not for the United States Attorney to determine whether or not the evidence in his possession is legally admissible.

Those are the issues in this case. The Government's brief claims there are various other grounds on which appellant's motion might be denied even if the Corriston evidence is admissible, and erroneously contends that this case merely raises issues of discretion for the trial court. These alleged grounds for denial of the motion are without merit. They stand contrary to the plain facts of record and are opposed to the first opinion of this Court in *Wolcher* v. *United States,* 200 F. 2d 493 (9th Cir. 1952). They were not accepted by the District Judge, and they could not be accepted in a sound exercise of discretion.

In effect the Government is contending that appellant's admitted large cash overceiling receipts on sales of case whiskey establish guilt of tax evasion conclusively and that there is no real substance to appellant's defense that these receipts did not exceed the amounts he paid as cash bonuses for acquiring the case whiskey in the black market.

Appellant's defense is a substantial one. Indeed this Court so held in *Wolcher* v. *United States,* 200 F. 2d 493, supra, on the first appeal, where Gersh, as rebuttal witness for the Government, admitted receipt of a substantial

part of the sums testified to by appellant but contended they were to buy coin machines which required advance payments in cash. The Government contended that any errors of the trial court were not prejudicial in view of appellant's own testimony of large cash receipts not reflected in his ordinary books. This Court's opinion reflects the large gap between proof of black market violations and proof of income tax evasion. In reversing the conviction it found that there was substantial and prejudicial error in excluding evidence to impeach Gersh's "coin machine" explanation.

On the second trial the jury convicted but recommended leniency. Unwilling to expose Gersh to the wider defense rebuttal envisaged by this Court's opinion the prosecution released Gersh from subpena on the second trial. On the Government's objection of lack of materiality,[1] the District Judge stopped the defense from questioning the cognizant internal revenue agent in charge concerning the bank records which at the first trial had corroborated Gersh's receipt of substantial cash sums from appellant. On the Government's objection the District Judge denied the application of defense counsel to reopen in order to call Gersh whom he had just learned was in fact in San Francisco. The Government's actions and the Court rulings are not argued here to be reversible error. But they are an important part of the background of this appeal in terms of the nature of the record underlying the second conviction.

Thus it is seen that the jury recommended leniency even on a record utterly barren of testimony corroborating appellant's evidence of black market payments to Gersh.

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[1] The Government later conceded that these records were material but argued that they should have been identified through Gersh and not a revenue agent who obtained them in the course of his investigation. (Opposition to Petition for Certiorari, No. 77, Supreme Court, October Term 1955, p. 17.)

Had Mr. Schnacke made that concession to Judge Goodman it cannot be doubted that the subsequent defense application to call Gersh would have been granted.

The prosecuting attorney argued tellingly that there was nothing other than appellant's unsupported testimony to establish any cash payments by appellant to Gersh, and nothing to connect Gersh, publisher of a coin magazine, with purchases in the whiskey black market. (R. 7-8.)

At the first trial the corroboration of appellant's cash payments to Gersh was established, but on the crucial issue of purpose of the payments, evidence tendered by appellant was rejected. At second trial appellant's testimony, both as to the payments to Gersh and as to the purpose thereof, was wholly uncorroborated.

The newly-discovered evidence will make available to a jury for the first time direct testimony corroborating appellant on the crucial issue that his substantial payments to Gersh were for the purpose of obtaining whiskey in the black market.

Having twice obtained convictions on truncated records, the Government fully appreciates the significance of a new trial and the impact of this newly-discovered evidence upon the jury. There is every reason to expect that a jury given all the evidence now available would acquit appellant. And we submit that the newly discovered evidence should not be rejected as legally inadmissible.

I. MR. CORRISTON'S TESTIMONY IS LEGALLY ADMISSIBLE

A. The testimony is clearly within the general principles of the res gestae rule and is barred by none of the recognized limitations on the res gestae rule.

Without detailing again the authorities in appellant's opening brief (pp. 18-21) the essentials of the res gestae doctrine provide for admissibility of extrajudicial declarations which either (1) are themselves acts in issue (whether as ultimate facts or evidentiary facts); or (2) are contemporaneous therewith, or are necessary incidents as immediate preparations for or emanations of such acts

and this stand in causal relation to the acts, and illustrate the character of the act or transaction.

Statements are res gestae if they are said under the immediate spur of the transaction, and are not mere narrative statements that may reflect a "voluntary individual wariness seeking to manufacture evidence for itself"—an interposition breaking the necessary causal relation.

What is the application of these principles to the case at bar?

Gersh's declarations were all "verbal acts"—solicitations of supply, negotiations to assure supply and ability to pay, and verbal agreements—that were actually part of his black market activities.

Mr. Gersh's declarations concerning the fact that he was acquiring the whiskey for appellant and was using money he had received from appellant both (a) served to illustrate the character of his black market activities, as made for the benefit of appellant, and (b) were stated as part of the preparations for the black market purchases and under the spur of consummating those purchases. For these declarations were made as part of an explanation to obtain Mr. Corriston's help, and more important were made to convince Corriston that he, Gersh, would be in a position to consumate the deal and thus to induce Corriston to arrange the meeting between Gersh and Taylor. These declarations were not mere narrations of past events but were rather an integral and causal part of a current black market purchasing program. They were thus admissible as part of the res gestae.

That these black market activities were relevant evidentiary facts to appellant's defense cannot be doubted. Indeed, Mr. Schnacke tellingly argued to the jury that Gersh was not shown by defendant to have engaged in any black market whiskey transactions. (R. 7-8.)

Whether the declaration is inadmissible as self-serving depends on the situation when the declaration was made. Thus in *Chicago M. & St. P. Ry. Co.* v. *Chamberlain,* 253

Fed. 429 (9th Cir. 1918), a witness testified that when he saw the plaintiff on the platform, and bid him goodby, plaintiff said he was going on through with the witness on the train. Judge Morrow said (p. 430):

> "It was not self-serving; unless it can be presumed that the plaintiff anticipated falling from the platform; and that he knew it was necessary that he should have the rights of an intending passenger to enable him to recover for whatever injuries he received . . .
>
> "In a sense, the testimony of the witness was hearsay, but it stood 'in immediate causal relation to the act—a relation not broken by the interposition of a voluntary individual wariness seeking to manufacture evidence for itself. Wharton on Evidence, (3d Ed., 1888), par. 259. In this sense it was a part of the res gestae."

See also e.g., *Roberson* v. *State,* 18 Ala. App. 143, 90 So. 70 (1921), where the Court held admissible as part of the res gestae a defendant's declarations at the time of the alleged offense which showed commission of a crime other than that for which he is charged.

The *Chamberlain* case also establishes that the declaration need not be made under stress of excitement to be admissible so long as it was a natural accompaniment of the transaction rather than a calculated wariness seeking to manufacture evidence. Accord: *Aetna Ins. Co.* v. *Licking Valley Milling Co.,* 19 F. 2d 177 (6th Cir. 1927), involving declarations immediately following a business transaction.

The Government's objection to a testimonial use of Gersh's res gestae declarations is without merit as a basis for excluding Corriston's testimony. First, there is no testimonial use required in the showing that Gersh was engaged in buying whiskey in the black market. As already noted, Mr. Schnacke pointed out to the jury that there was no evidence connecting Gersh to the whiskey black market (R. 8). Such evidence is provided by Gersh's statements of current and proposed activities, and of his intention in

paying money; these statements are in no way narrative or used testimonially.

Second, although res gestae declarations are not admissible merely because of their testimonial use, if they are admissible as the incidents of an act or transaction in issue—here the black market activity—they may be used testimonially insofar as they describe the nature or character of the incidents—black market purchases for the benefit of Wolcher. This is plain from the *Chamberlain* and *Aetna* cases cited above, and from *Insurance Co.* v. *Mosley*, 8 Wall. 397 (1869), and the other cases cited in appellant's opening brief.

Indeed, the Federal courts have often noted that the contemporaneous declaration that is part of the res gestae is more likely to be reliable than the subsequently deliberated testimony. It was early noted that the res gestae exception to the hearsay rule should not be narrowly or technically applied. *Insurance Co.* v. *Mosley*, 8 Wall. 397, 408 (1896). And that is also the modern tendency of the cases, see *Weatherbee* v. *Safety Casualty Co.*, 219 F. 2d 274, 278 (5th Cir. 1955).

B. In any event, Gersh's statements to Corriston are admissible as declarations of a co-conspirator

1. Appellant insists, as was urged in the opening brief, that as a matter of principle the declarations of Gersh, having been made by appellant's partner in crime during the pendency of their conspiracy, should be admissible at the behest of appellant to prove the OPA violation since they would have been admissible at the Government's instance in an OPA violation case.

2. Whether or not all Gersh's declarations during the pendency of the conspiracy are admissible his statements to Corriston are admissible because they are part of the res gestae of the black market conspiracy.

a. The declaration of a co-conspirator can be availed of by an accused if it is part of the res gestae of the conspiracy.

This has been a recognized part of the common law since Justice Best decided *Rex* v. *Whitehead,* 171 Eng. Rep. 1105 (1824), and overruled the objection that letters between co-conspirators could be evidence against them but not in their favor. The rule is noted in 22 Corpus Juris Secundum, Criminal Law, sec. 777, and 16 Corpus Juris, Criminal Law, pp. 668-9, citing *Rex* v. *Whitehead, supra; Meador* v. *State,* 72 Tex. Cr. 527, 162 S. W. 1155 (1914), and *Zellerbach* v. *Allenberg,* 99 Cal. 57, 33 Pac. 786 (1893). In the *Zellerbach* case, the court said that "any communications from one alleged conspirator to the other, made while the conspiracy was in progress, and relating to its subject matter, were part of the res gestae, and admissible."

In this connection it should be noted that declarations of an agent made in connection with a transaction are admissible in evidence as part of the res gestae, even though offered in favor of the principal. 32 C. J. S., Evidence, sec. 410; *Aetna Ins. Co.* v. *Licking Valley Milling Co.,* 19 F. 2d 177 (6th Cir. 1927); *American Ins. Co.* v. *Lowry,* 62 F. 2d 209 (5th Cir. 1932). Men who enter into concert for an unlawful end "become *ad hoc* agents for one another and have made a partnership in crime." *United States* v. *Pugliese,* 153 F. 2d 497, 500 (2d Cir. 1945); see *Cosgrove* v. *United States,* 224 F. 2d 146 (9th Cir. 1955).

b. Since a conspirator's declaration that is part of the res gestae of a conspiracy is admissible in favor of a co-conspirator, the only question is whether Gersh's statements to Corriston are part of the res gestae of the black market conspiracy.

It has been specifically and repeatedly held that where the facts show a conspiracy or common plan, the scope of the res gestae is viewed broadly by the courts and includes all declarations in furtherance of the common object, all declarations that are part of the res gestae of acts done in furtherance of the common object, and indeed all declarations relating to the common object.

A leading case is this Court's opinion in *Jones* v. *United States,* 179 Fed. 584 (9th Cir. 1910). Judge Morrow's opinion undertakes an extensive review and analysis of numerous Supreme Court decisions admitting declarations of a co-conspirator in evidence, points out that these opinions hold the declarations admissible on the ground that they are part of the res gestae of the conspiracy, and further points out that the res gestae of a conspiracy include declarations in furtherance of the common object, declarations that are part of the res gestae of acts done in furtherance of the common object, and declarations relating to the common object.

The *Jones* case charged a conspiracy to defraud the United States out of timber lands. There was admitted in evidence a statement by forest superintendent Ormsby to his son, made prior to the date that he went to look over the land, that there was going to be a reserve established in eastern Oregon.

It was objected that the declarations of a co-conspirator cannot be admitted unless made in aid or execution of the conspiracy. The court held that this rule limited admissibility to declarations made during the pendency of the conspiracy, but did not require the declaration itself to be in furtherance of the conspiracy. This court ruled (p. 60) that "the statement was made while the conspiracy was in progress, related to the object of the conspiracy, and was therefore part of the res gestae."

In *Vilson* v. *United States,* 61 F. 2d 901 (9th Cir. 1932) this Court held the rule applicable even though there was no conspiracy charge, stating (p. 902): "The common object of the associated persons forms a part of the res gestae, and evidence was admissible, even though conspiracy was not charged."

3. The cases holding certain extrajudicial declarations of a co-conspirator inadmissible in favor of the accused rest on particular rules that are consistent with the doctrine stated above (point 2) and have no bearing in excluding Corriston's testimony.

a. First there are cases like *Nothaf* v. *State,* 91 Tex. Cr. 378, 239 S. W. 215, cited in the Government's brief (p. 16), where exculpatory declarations were made by an accomplice in jail. These merely exemplify the requirement that the conspiracy be in progress. The arrest of a conspirator terminates as to him both the conspiracy and the res gestae, so that his subsequent declarations cannot be used either for or against the others. *People* v. *Beller,* 294 Mich. 464, 293 N. W. 720 (1940); see *United States* v. *Pugliese,* 153 F. 2d 947 (2d Cir. 1945).

b. Second, extrajudicial declarations of a third party confessing *exclusive* guilt are inadmissible. *Donnelly* v. *United States,* 228 U. S. 243 (1913). These declarations by their very nature are not made as a part of or during pendency of a conspiracy.

c. An extrajudicial declaration of a person involved in a crime which is self-serving when made is not in furtherance of the conspiracy, and under standard doctrine can not be considered part of the res gestae since a self-serving declaration breaks the "causal relation" to the acts of the conspiracy. *May* v. *United States,* 157 Fed. 1, 4 (9th Cir. 1907); see *Chicago M & St. P. Ry.* v. *Chamberlain,* 253 Fed. 429, 430 (9th Cir. 1918).

4. Gersh's declarations were in furtherance of the conspiracy; they accompanied acts in furtherance of the conspiracy; and they related to the object of the conspiracy. By every test they are declarations of a co-conspirator admissible, as part of the res gestae of the conspiracy, both against appellant and likewise in his favor. They would be admissible even if they had been favorable to appellant when made by Gersh provided they did not negative the common association and related to the object of that association. But in this case the statement was not exculpatory of anyone when made, nor self-serving in any way. The declaration when made fully implicated both Gersh and appellant in the black market crimes. There is no basis in reason, justice or precedent for holding them inadmissible.

II. THE DISTRICT JUDGE ERRED IN FAILING TO CALL UPON THE UNITED STATES ATTORNEY TO PRODUCE FOR EXAMINATION THE EVIDENCE IN HIS POSSESSION.

Appellant has no information and no evidence, other than Corriston's testimony, of cash payments by Gersh to obtain whiskey in the black market and certainly no evidence that Gersh's payments were passed on to persons high in the whiskey syndicate.

United States Attorney Burke admits (R. 21-22) he told Mr. Chotiner that he had evidence in his possession that the money appellant paid Gersh was passed on to people high in the whiskey syndicate.

Mr. Burke stated to Mr. Chotiner that this evidence was not conclusive of appellant's innocence because the Government was not convinced that appellant sent Gersh as much as he testified. But the evidence supplies the significant missing link that the substantial sums that appellant sent Gersh were for whiskey black market purchases. *Wolcher* v. *United States,* 200 F. 2d 493 (9th Cir. 1952). Since the evidence goes to the heart of the case it warrants a new trial as the evidence plainly raises a reasonable doubt of guilt.

The Government relies solely on the ground that appellant did not controvert Mr. Burke's statement that this "evidence" was not legally admissible evidence. That is a conclusion of law to which appellant could not respond one way or another. For appellant is, of course, unaware of the contents of the Government's files.

The narrow issue is whether the United States Attorney may make a unilateral determination conclusive upon appellant and the courts that such evidence is not legally admissible.

The broader underlying issue is one of Government absolutism. As the Supreme Court said in *Berger* v. *United States,* 294 U. S. 78 at 88 (1935):

> "The United States Attorney is representative not of an ordinary party to a controversy but of a sovereignty whose obligation to govern impartially is as

compelling as its obligation to govern at all, and whose interest, therefore, in a criminal prosecution is not that it should win a case but that justice shall be done.''

In *Griffin* v. *United States,* 183 F. 2d 990 (Ct. App. D. C. 1950), the court held it improper for the United States Attorney to withhold significant evidence, however reasonable his views that the evidence is not legally admissible. He is a public official who has no proper interest in concealment of any part of the whole picture of the case. The evidence which he deems legally inadmissible should have been presented to the District Judge for examination. It is for the court and not the United States Attorney to determine the admissibility of the evidence.

III. THERE IS NO MERIT IN THE GOVERNMENT'S CONTENTION THAT THERE ARE GROUNDS ON WHICH THE MOTION FOR NEW TRIAL MIGHT BE DENIED EVEN IF CORRISTON'S TESTIMONY IS ADMISSIBLE. THOSE CONTENTIONS WERE NOT ACCEPTED BY THE DISTRICT JUDGE AND THEIR ACCEPTANCE WOULD CONSTITUTE AN ABUSE OF DISCRETION.

A. The Government errs in contending that the order of the District Judge was not based upon a ruling that Corriston's evidence was inadmissible

The District Judge denied a new trial on the ground that appellant's motion supported by the affidavits of Mr. Corriston and Mr. Chotiner "fails to set forth any legal basis for granting a new trial to the defendant on the ground of newly discovered evidence." (R. 26)

The meaning of this ruling was plain in context. Appellant's motion prayed a new trial so that the jury could consider not merely his own unsupported testimony which alone was sufficient to result in a recommendation of leniency, but also the significant corroboration (a) in the new evidence of Mr. Corriston and (b) the new evidence available from United States Attorney Burke, according to Mr. Chotiner.

The Government contended that Mr. Corriston's evidence was not legally admissible, and that the "evidence"

in the possession of Mr. Burke was not legally admissible evidence.

Clearly the District Judge was ruling that there was no legally admissible evidence before him, and therefore there was no legal basis for granting a new trial.

In *Balestreri* v. *United States,* 224 F.2d 915, 918 (9th Cir. 1955), relied on by the Government, this Court stated that it would not reverse the denial of a motion for new trial where it was "manifest the trial court did not act arbitrarily or capriciously nor upon any erroneous concept of the law." In this case it is certainly not manifest that the "trial court did not act . . . upon any erroneous concept of the law." To the contrary it is clear that the District Judge was acting upon a view of the law of evidence, which if correct negatived any legal basis for granting a new trial, but which was erroneous.

If the District Judge had intended to exercise his discretion concerning the facts, he would have so indicated and afforded appropriate opportunity for defendant to advise him, e.g., of any error in his recollection of the facts of the case. Otherwise the denial might be based on a manifest error which the District Judge did not appreciate, and which could never be explained to him or reviewed by an appellate court—a result abhorrent to the law.

Thus, in *Balestreri* v. *United States,* supra, District Judge Goodman wrote a memorandum. He found "that no proximate relationship was shown between the occurrences [brought out by the motion concerning the prosecution's witness] . . . and his testimony later given at the appellant's trial." (p. 917), and concluded that defendant's showing did "not have the substance which would invoke the exercise of judicial discretion on a motion for new trial." (p. 918.)

In contrast, District Judge Goodman's order in this case stated that there was no "legal basis for granting the motion" and plainly was grounded upon a ruling as to

the admisibility of the evidence. His ruling is unsound in law and fully reviewable by this Court.

Furthermore, as will now be demonstrated, there is no merit whatever to the Government's contentions that there are other grounds on which the new trial might be denied. The District Judge did not accept those contentions. Indeed it would constitute an abuse of discretion to accept those contentions.

B. Denial of new trial cannot be supported on the hypothesis that even assuming the truth of defendant's testimony there was a net profit of some $17,406.71. That is flatly contrary to the records in the case and to the prior opinion of this Court.

The Government argues (Govt Br. 21) that even assuming the truth of the defense evidence [of the cash bonuses paid by appellant to obtain the case whiskey], it would appear that appellant made and failed to report a profit of some $17,406.71. This argument is wholly and palpably erroneous in fact, and indeed contrary to the prior opinion of this Court.

The Government is perfectly well aware that appellant's testimony as to the bonuses paid by appellant in the acquisition of case whiskey accounted for all his black market receipts and showed him innocent of tax evasion. That is clear from the briefs filed in this Court in the appeal from the second conviction,—not only the appellant's brief[2] but also the Government brief signed by Mr. Burke and Mr. Schnacke. That brief, filed in June 1954, stated (pp. 18-19):

> "Clearly, if the case was to be decided on the admitted facts, appellant was guilty, unless there was additional expense which resulted in no profit being realized. The only evidence of any admitted expense came from the unsupported word of the appellant himself. The only question remaining, after considering the admissions, was whether the appellant's

[2] See appellant's opening brief, No. 14109, p. 20: "There was no dispute that if Wolcher's testimony was true he made no profit on the whiskey transactions. A mathematical computation of the amounts he said he paid compared to the number of cases sold to outsiders over the ceiling prices, shows no taxable profit."

> story of his additional cost was believable, for if it was not believed by the jury, at least to the extent of raising a reasonable doubt of guilt, the admitted facts justified conviction. *If it was believed, then, of course, the jury should acquit.* The case was as simple as that, and that was what the instruction explained to the jury." (Emphasis added)

Appellant's brief on the first appeal contained the detailed mathematical computation showing that after deducting the amounts the appellant said he paid to get whiskey there was no profit in the appellant's black market receipts. The appendix to this closing brief sets forth summarizing entries copied from said brief.

That showing was a necessary part of this Court's decision in *Wolcher* v. *United States*, 200 F.2d 493 (9th Cir. 1952) rendered in No. 12992. This Court found prejudicial error in the exclusion of testimony that would have had weight in determining "whether Wolcher or Gersh was telling the truth with respect to why the money was sent by Wolcher." But if the Government were correct that appellant's own testimony established a net profit exceeding $17,000, then this Court could not have found prejudicial error in the evidence rulings.

The Government's appendix in No. 14919 looks like a careful computation. But it rests on a glaring omission: *It ignores the bonuses which defendant had to pay in order to obtain the whiskey which was resold at the ceiling price.*

It is hard for appellant to understand how the Government,—"whose interest in a criminal prosecution is not that it should win a case but that justice shall be done" (*Berger* v. *United States, supra*, p. 11)—could have omitted these payments by appellant in the computations it prepared for this Court.

The distortion from this omission is clear. Take, for example, the third Eastern shipment, of 500 cases of Golden Wedding whiskey. The Government's computation shows, correctly, that 50 cases were resold at ceiling,[3]

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[3] They were resold to the "Showboat", (R.14109, p. 131), a bar in which appellant was interested (R. 14109, p. 346).

and that the balance of 450 cases were resold over ceiling. The Government's appendix states that to get the whiskey, appellant paid a cash bonus of $9,000 (450 cases at $20 a case). But appellant testified he paid a bonus of $20 a case on all the whiskey received in this shipment (R.14109, p. 361-2). Since 500 cases were received that means a payment of $10,000 instead of $9,000.

It is undeniable that appellant's testimony shows that he paid more than $17,500 as bonuses merely to get the Eastern whiskey he resold at ceiling to taverns in which he or members of his family were interested. The Government's computation shows a profit only because its reflects only the bonuses paid to obtain 3,764 cases of whiskey, as if 3,764 cases were all that was involved. But appellant, as the Government brief points out (p. 19), handled 5,138 cases of whiskey.

It is appropriate to note that the Government's statement Govt. Br., p. 3) that appellant "did not appear" in the transactions involving sales to taverns at ceiling prices is wholly misleading. The *form* of the transactions, both to the taverns of outsiders and to the taverns of appellant and his family, was that of sales at ceiling by the distributors. The *substance* is that the distributor in all cases acted as appellant's agent. The Government's own witnesses unequivocally testified that it was appellant and only appellant who arranged for shipment of this case whiskey from the East, that only appellant had an interest therein, and that only appellant gave directions as to its distribution.[4] In short, it is appellant's contention—and this contention is supported by his testimony—that he paid a substantial black market bonus to obtain 5,138 cases of the whiskey, and that he recouped this outlay, and no more, on the sales to outsiders.

The computations in appellant's opening brief in No. 12992, summarized in the appendix, *infra,* p. 25 make no inference favorable to appellant other than accepting his

[4] As to Franciscan Co., see testimony of Government witness Samuel Weiss (R.14109, pp. 123-125, 142-143.) As to George Barton Co., see testimony of Government witness Cy Owens (R.14109, pp. 75-7, 84, 89-90) and James Oligny (R.14109, pp. 103-4, 109).

testimony of the cash bonuses paid by him to obtain the whiskey. Indeed, as appears from the Note to the appendix, *infra,* appellant's computation assumes even greater cash receipts by appellant than the Government's computation. It does not assume that any of the appellant's sales were at ceiling except for the whiskey kept for and sold to the taverns in which appellant and his family were interested, taverns which undeniably purchased at ceiling. The Government, concededly, has not proved any greater receipts for appellant on the second trial than at the first trial.

In an effort to sustain the ruling below as an exercise of discretion, the Government has baldly ignored a substantial part of the bonus payments testified to by appellant—not only disregarding the clear record and the opinion on the first appeal, but also apparently forgetting its own brief in No. 14109.

C. Denial of new trial cannot be supported on the hypothesis that the volume of whiskey admittedly involved shows appellant is guilty of income tax evasion.

The Government argues that since admittedly appellant was engaged in handling 5,138 cases of whiskey it is "simply unbelievable" that he made no profit and therefore "it is extremely unlikely" that any jury could acquit (Govt. Br., 19-22).

The Government's contention was properly ignored by the District Judge since (1) it misrepresents the basis of the defense and (2) it wholly ignores this Court's first opinion and the substantial corroboration of appellant.

1. The Government's argument misrepresents the basis of the defense by making it seem as though appellant is claiming that no advantage inured to him from the handling of this whiskey.

On the contrary, appellant expressly testified that "there was a profit made, but not from the sale of the liquor by the case as such." (R.14109, p. 410.) Appellant's sales over ceiling did yield a profit but in this sense,—that liquor, which was practically speaking unavailable in ordinary commercial channels, was purchased by the case and sold by the glass in the taverns owned by ap-

pellant and members of his family. Instead of having to pay black market prices these taverns were able to purchase from appellant full supplies of case whiskey at ceiling prices. This difference alone exceeds $17,500 apart from the profit due to the fact that larger volumes of whiskey were handled than could otherwise be acquired at ceiling.

The taverns concededly made profits but there is no contention, and there could be none, of understatement of income in the returns filed for these taverns. In short, the "retail" profits were not understated; the critical question is whether appellant also made a profit on the "wholesale" sales of case whiskey. Appellant's claim is that he made no profit on the purchase and sale of case whiskey.

2. The Government's contention wholly ignores both this Court's first opinion and the significant corroboration of the Corriston evidence.

In *Wolcher* v. *United States,* 200 F.2d 493 (9th Cir. 1952), this Court found prejudicial error in the exclusion of evidence tending to impeach Gersh's explanation that the money he received from appellant was to buy coin machines. The Government then argued that any error of the trial court was not prejudicial in view of the uncontradicted evidence of appellant's large cash overceiling receipts which he withheld from his ordinary banking and business records. (Govt. Br., No.12992, p. 42.)

This Court rejected the view that this error in excluding pertinent evidence did not "affect substantial rights" of the appellant, and said:

> "We think this evidence was material. It would have had weight in determining the question whether Wolcher or Gersh was telling the truth with respect to why the money was sent by Wolcher." (200 F. 2d at p. 499.)

The Government's argument now is in essence the same as its argument in No. 12992, that the mere admitted facts are virtually incontrovertible evidence of guilt.

The argument must fall now as it fell then. This Court is aware now as it was aware then that appellant's defense is a substantial one. This Court was fully aware at the time the case was remanded for new trial that Gersh admitted the handling of only 60% of the amounts which the appellant testified he sent to Gersh. But the amounts admittedly handled by Gersh were very substantial.

The missing link, the substantial gap in the case, was the need for evidence to support appellant's testimony that the moneys he sent to Gersh were for the purchase of black market whiskey. While Gersh "stated that in 1943 he had handled money belonging to Wolcher in amounts totaling $85,000, his version was that the money was sent to him to obtain coin machines for Wolcher." (200 F. 2d at p. 495.)

So far as amounts are concerned, Corriston's testimony would corroborate appellant's testimony, contradicted by Gersh, that in November 1943 appellant gave Gersh $30,000 in cash. This is, of course, in addition to Gersh's net receipts of the $50,800 corroborated by bank records at the first trial.[5] This corroborates payments to Gersh of over 90% of the amount that Mr. Schnacke established as appellant's overceiling receipts on the resale of the Eastern whiskey.[6] The balance is accounted for by appel-

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[5] Part of the $85,800 admittedly handled by Gersh consisted of two bank drafts totaling $35,000 which appeared on appellant's books, and which was eventually cleared off by Gersh's checks or merchandise.

At the first trial it was also established that appellant sent Gersh a $12,500 cashier's check on September 29, 1943, and $38,300 in cash. These cash shipments were shown by Gersh's own bank account records of deposits, records that Gersh could not gainsay (See Appellant's Opening Brief, pp. 7-9).

The $30,000 which appellant testified he gave Gersh in cash in November 1943 is in addition to the moneys which Gersh admittedly handled.

[6] Mr. Schnacke established appellant's overceiling receipts on the Eastern whiskey at $88,853.71. The details are contained in typewritten transcript of Mr. Schnacke's summation, August 31, 1953, pp. 3-9. They are summarized in the table at page 5 of appellant's opening brief.

Appellant's own testimony supplied the bulk of the evidence of appellant's overceiling facts to which Mr. Schnacke referred. See Note to Appendix, *infra*, p. 27. Mr. Schnacke quite properly excluded any reference to the few bars where appellant did not have a recollection as to the basis of his sales.

lant's testimony of occasional shipments to Gersh of lesser cash sums (R. 14109, p. 404).

But the prime importance of Corriston's evidence is that it supplies the critical missing link: it furnishes corroboration for appellant's otherwise unsupported evidence that the money he sent Gersh was for cash overages in buying whiskey in the black market.

As Justice Douglas states in his opinion of December 31, 1955 (appendix to appellant's opening brief):

> "He [Corriston] offered testimony which appears to be probative of a crucial fact issue in the case—whether Wolcher gave large sums of cash to one Gersh as over-ceiling payments for black market whiskey * * * If the evidence is admissible, it might well tip the scales in defendant's favor, as it goes to the heart of the case."

Mr. Schnacke put it to the jury, and most persuasively, that there was nothing to support appellant's testimony that he sent large sums to Gersh to pay as cash bonuses for black market whiskey, nothing to show that Gersh was a "significant factor." (R. 7-8.)

Corriston's evidence will not be merely cumulative of other testimony of the same kind but will be corroboration in a record devoid of any evidence other than appellant's unsupported testimony that he made payments to Gersh to obtain whiskey in the black market, or indeed that Gersh made any purchases in the whiskey black market. There is a fundamental distinction between such corroborative evidence and merely cumulative evidence. 32 C.J.S., Evidence, p. 1039. Corriston's evidence "goes to the heart of the case." It is, in Judge Chesnut's phrase, "substantial in the perspective of the case as a whole." *United States* v. *Frankfeld,* 111 F. Supp. 919, 923 (D.Md. 1953). It will obviously carry weight with the jury, and there is every reason to expect that the jury will find the appellant not guilty.

D. Denial of new trial cannot be supported on the ground that there is no new evidence.

The Government argues (Govt. Br., 17-19) that "there is no new evidence," and that Corriston's testimony is "to the same effect as direct, competent testimony which was available to appellant at the time of trial." There is no substance to this Government contention.

Appellant's motion for new trial and supporting affidavits, construed fairly and liberally to the accused (see *Hamilton* v. *United States,* 140 F. 2d 679, Ct. App. D. C. 1944), clearly submits that Corriston's evidence is the first evidence available to appellant of Gersh's black market whiskey purchases (other, of course, than appellant's own testimony), and explains why such evidence was not previously known to appellant.

The Government notes that Gersh was a witness at the first trial but was not called as a witness at the second trial.[7] But all defense would have obtained from Gersh was corroboration of appellant's testimony that he sent substantial sums of cash to Gersh. Gersh would not have testified to the crucial corroboration now supplied by Corriston, as to Gersh's cash purchases of whiskey in the black market. Indeed when Gersh was called by the Government at the first trial he testified exactly to the contrary, that he at no time made large purchases of whiskey, either in his own behalf or for anyone else. (R.12992, p.558). But of course by trial time Gersh's interest had become adverse and hostile to appellant's.

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[7] It will be recalled that Gersh was subpoenaed by Government and released by Mr. Schnacke without notice to the defense; that Mr. Schnacke challenged as immaterial the examination of Appling (revenue agent in charge), to identify the Gersh bank records authenticated by Gersh as a Government witness at the first trial; that Mr. Schnacke refused to stipulate those records on the ground that he was not present at the first trial and knew nothing of those records; and that Mr. Schnacke objected to the application of defense counsel, made immediately after the recess and promptly upon learning that Gersh was in fact in town to call Gersh to identify the bank records. See R. 14109, pp. 464-473.

Mr. Schnacke seeks credit from the fact that at the second trial he offered to stipulate the reading of Mayer's testimony at the first trial. This was hardly a magnanimous proposal—Mr. Schnacke was merely offering to stipulate testimony that he knew fell short of proof that Gersh had engaged in whiskey black market transactions. For although Mayer testified at the first trial that Gersh arranged for a whiskey shipment from Mayer to Franciscan (R. 12992, pp. 402-7), Mayer did not testify that Gersh had made any cash payment to get the whiskey. Moreover, the Government is fully aware that Mayer, who had been subpoenaed by the Government from the East Coast (R.12992, p.404), advised both the Government and defense counsel that he would decline to answer whether he had charged Gersh a bonus on the whiskey.

The Government's contention as to Taylor, made now for the first time, is likewise without substance. Prior to Corriston's disclosure, appellant, of course, was unaware of Gersh's black market activities with Taylor for the very obvious reason that Gersh, the only other party involved, instead of revealing the facts deliberately concealed and misrepresented them.

Direct, competent testimony of Gersh's black market activities was not previously available to appellant. It is of course no easy task to secure evidence of black market activities from those reluctant to disclose any knowledge of or contact with such activities. It was not until recently, when Corriston overcame that reluctance and came forward with his testimony, that appellant had available any testimony to corroborate his own evidence of his black market payments.

CONCLUSION

The District Judge erred in his conclusion that the Corriston evidence was legally inadmissible, and in giving conclusive effect to the affidavit of the United States

Attorney that the evidence in his possession was not legally admissible.

To obtain an affirmance, the Government hypothesizes that the District Judge might have exercised a discretion as to the facts, and offers a number of possible grounds. The District Judge did not deny the motion on the basis of these Government contentions. And indeed he could not properly have done so, for the Government's contentions, considered one at a time, prove to be contrary to the record and to this Court's prior opinion. That opinion rejected the contentions now being urged by the Government that appellant's defense is insubstantial.

Appellant has been convicted for his black market violations. He admits that the black market operations resulted in substantial benefit to the taverns in which he and his relatives were interested, but the Government does not contend there was an understatement of income for these taverns. Appellant denies the charge that he realized taxable income on the wholesale sales of whiskey by the case.

The issue is not what the prosecuting attorney contends, but what the jury may be reasonably expected to believe. Although appellant has been convicted twice, each time the conviction was on a record truncated due to the objections of the prosecuting attorney. Now due to the newly-discovered evidence the record will contain for the first time clear evidence corroborating appellant's critical testimony as to his payments for black market whiskey. No such corroborative evidence was available or known to the appellant prior to the recent discovery of the facts disclosed in Corriston's affidavit.

The jury recommended leniency on a record which was, as the prosecutor tellingly pointed out, devoid of such corroboration. The newly-discovered evidence corroborating appellant "goes to the heart of the case," and requires a new trial.

The order of the District Judge should be reversed and remanded with instructions to grant a new trial pursuant to Rule 33.

Respectfully submitted,

Leo R. Friedman
Harold Leventhal
Attorneys for Appellant

Dated: San Francisco, California
March 19, 1956

APPENDIX

The following entries of appellant's net profit and loss on the sale of case whiskey, shipment by shipment, are taken from the computation in appellant's opening brief (appendix, pp. xix-xxi) on the first appeal (*Wolcher* v. *United States,* No. 12992, U. S. Court of Appeals for the Ninth Circuit)

WOLCHER'S PROFIT AND LOSS
IN THE SALE OF CASE WHISKEY

Shipment	Net Profit (Or Loss)
100 cases Supreme Bourbon	$ 13.45
500 cases Schenley Royal Reserve	(1,618.55)
500 cases Golden Wedding Rye	1,475.00
500 cases Gallagher & Burton	(1,188.00)
1000 cases Gallagher & Burton	850.00
2038 cases Old Boston Rocking Chair (including $3,000 commission from George Barton Co.)	1,835.00
500 cases Old Brook	(2,012.50)*
Net Profit	$1,730.80

But tax was paid on $3,000, the commission paid to Wolcher by George Barton Co. on the Old Boston Rocking Chair whiskey transaction.

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* There is a minor arithmetical error. The Old Brook loss should be $2,912.50, and the net profit should be reduced by $900.00.

The detailed computations are set forth in appellant's opening brief in No. 12992. The profit and loss figures, shipment by shipment, can also be determined by comparing appellant's cash payments, (bonuses paid over and above the OPA price shown as invoice cost), with appellant's cash receipts (sales price to outsiders less invoice cost), as follows:

SUPREME BOURBON

Cash Payments Above Ceiling:	100 cases at $20.00	$ 2,000.00
Cash Receipts Above Ceiling: ($55 less $33.35 invoice)	93 cases at 21.65	2,013.45
Sold at Ceiling:	7 cases	—
Net Profit		$ 13.45

SCHENLEY ROYAL RESERVE

Cash Payments Above Ceiling:	500 cases at $20.00	10,000.00
Cash Receipts Above Ceiling: ($60.00 less $38.23 invoice)	385 cases at 21.77	8,381.45
Sold at Ceiling:	115 cases	—
Loss		($ 1,618.55)

GOLDEN WEDDING RYE

Cash Payments Above Ceiling:	500 cases at $20.00	10,000.00
Cash Receipts Above Ceiling: ($60.00 less $34.50 invoice)	450 cases at $25.50	11,475.00
Sold at Ceiling:	50 cases	—
Net Profit		$ 1,475.00

GALLAGHER & BURTON

Cash Payments Above Ceiling:	500 cases at $25.00	12,500.00
Cash Receipts Above Ceiling: ($60.00 less $30.50 invoice)	464 cases at $29.50	13,688.00
Sold at Ceiling:	36 cases	—
Loss		($ 1,188.00)

GALLAGHER & BURTON

Cash Payments Above Ceiling:	1000 cases at $25.00	$25,000.00
Cash Receipts Above Ceiling:		
Fifths: ($60.00 less $30.50 invoice)	500 cases at $29.50	14,750.00
Pints: ($60.00 less $37.80 invoice)	500 cases at $22.20	11,100.00
Net Profit		$ 850.00

OLD BOSTON ROCKING CHAIR

Cash Payments Above Ceiling:	2038 cases at $25.00	50,950.00
Cash Receipts Above Ceiling: ($60.00 less $26.92 invoice)	1505 cases at $33.08	49,785.40
Sold at Ceiling:	533 cases	—
Commission from George Barton Co.		3,000.00
Net Profit		$ 1,835.40

OLD BROOK

Cash Payments Above Ceiling:	500 cases at $20.00	$10,000.00
Cash Receipts Above Ceiling: ($72.15 less $51.90 invoice)	350 cases at $20.25	7,087.50
Sold at Ceiling:	150 cases	—
Loss		($ 2,912.50)

As appellant's brief in No. 12992 sets forth, these calculations of profit and loss are based on the following:

(1) OPA price equals "invoice cost." This does not include bonuses paid by appellant.

(2) Bonuses paid by appellant as stated in his testimony.

(3) It is assumed that the only sales at ceiling prices are to taverns in which appellant or his family were interested; and that the selling price is the same on all sales to outsiders: $60 per case, except for Supreme Bourbon ($55) and Old Brook ($72.15).

NOTE

The computation in appellant's appendix assumes even greater cash receipts by appellant than the Government's computation in its appendix in No. 14919.

In the first place, the great bulk of the Government's evidence of black market receipts came from appellant himself. The Government's witnesses, thirteen tavern owners and Roy Clemens, accounted for approximately $30,000 in appellant's black market cash receipts.

It is on the basis of this testimony by appellant that Mr. Schnacke pointed out in his summation to the jury that the amount of appellant's over-ceiling receipts shown in the proof was more than twice as great as the amount in the indictment or the amount stated in the prosecution's opening statement. (See Transcript, Summation August 31, 1953, p. 9.)

Appellant candidly testified on cross-examination that he sold whiskey in the black market, at $55 a case on the first Eastern shipment, and at $60 a case thereafter, not only to the taverns covered by the Government's witnesses, but also to other taverns, one by one.

Appellant testified that only ceiling prices were obtained from taverns in which he or his relatives had an interest. In the case of three other taverns he did not recall the

price.* The Government quite properly admits in its computation, as Mr. Schnacke admitted at argument, that it had not proved overceiling receipts on these three taverns. But the foregoing computation set forth by appellant in this Appendix treats all sales to outsiders alike. Only sales to taverns in which appellant or members of his family had an interest are computed as sales at ceiling.

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* See R. 14109, pp. 428-434. Appellant testified that he thought the 2089 Club paid $55, but he didn't remember, and the shipment there might have been at ceiling. There was a chance that they bought at ceiling. As to House of Pisco, which took two shipments, there may have been a shipment at ceiling. As to International House, he did not remember but he might have let them have it at his cost, and might have let them buy at ceiling.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 14919

LOUIS E. WOLCHER, *Appellant*

v.

UNITED STATES OF AMERICA, *Appellee*.

PETITION FOR REHEARING

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IN THE

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FOR THE NINTH CIRCUIT

No. 14919

LOUIS E. WOLCHER, *Appellant*

v.

UNITED STATES OF AMERICA, *Appellee.*

PETITION FOR REHEARING

TO THE HONORABLE WILLIAM HEALY, WILLIAM ORR AND WALTER L. POPE, JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT:

Comes now Louis E. Wolcher, appellant herein, and files this petition for rehearing of the order and opinion of this Honorable Court, dated May 15, 1956, affirming the order of the District Judge denying the motion for new trial on the ground of newly discovered evidence.

I. THE COURT COMMITTED SUBSTANTIAL ERROR INSOFAR AS IT AFFIRMED ON THE SUPPOSITION THAT A NEW TRIAL WOULD RESULT IN A GUILTY VERDICT.

A. IN SPECULATING AS TO THE BASIS ON WHICH A JURY MIGHT CONVICT, THE COURT'S OPINION REFLECTS A SERIOUS MISUNDERSTANDING AS TO THE FACTS AND IS UNJUST TO APPELLANT.

It is the unavoidable duty of counsel for appellant to bring to the attention of this Court that its opinion is inaccurate and unjust to appellant insofar as it sets forth

a supposition that a new trial would not produce a different result.

Whether or not the Court reconsiders or adheres to its views of the applicable rules of evidence (point II below) counsel respectfully submits that this Court should at least eliminate the last four paragraphs of its opinion.

This Court should not wish to deny or prejudice the right of appellant to present to the Supreme Court the legal questions of the appropriate rules of the admissibility of evidence which Mr. Justice Douglas indicated "go to the heart of the case."

(1) This Court misunderstood the defense to rest on the claim that there was no profit whatever from black market activities. The defense was not that there was no profit but rather that the profit was at the tavern (retail) level and not the wholesale level. The tavern income was fully reported and there is not even a suggestion to the contrary.

The Court's opinion sets forth that appellant's defense "was simply that *he made no profits.*" (Emphasis in original.) In the next to the last paragraph, the Court says that the "story" that appellant ran the risk of fine and imprisonment without any gain is "implausible," nowithstanding appellant's assertion that he did so in order to obtain liquor for his own taverns.

The Court misunderstood the basis of appellant's defense. As is pointed out in appellant's closing brief (pp. 17-18) appellant did not say there were no profits, but rather expressly testified that the profit was not from sale of liquor *by the case,* at wholesale, but was rather realized at the retail (tavern) level:

> "A. Well, I did make a profit. I did make a profit. I made a profit from the sale of this liquor through the taverns which I owned, and those members of my family made a profit and were able to make some money and to repay the loans that it had taken to start these businesses. *So there was a profit made,*

but not from the sale of liquor by the case as such.'' (R. 14109, pp. 409-410.) (Emphasis supplied.)

Appellant's assertion is not merely that his black market activities enabled him to obtain whiskey for the Wolcher taverns, i.e., the taverns owned by appellant and members of his family. Appellant's assertion is specifically that his black market activities enabled him to sell large quantities to the Wolcher taverns *at ceiling.*

Appellant's defense is not that there was no profit, but rather that the gain was realized at the retail (tavern) level, not at the wholesale level. If appellant had obtained only the 3,764 cases of whiskey which were resold in the black market, as itemized in the Government's appendix, he would clearly have made a wholesale profit, since his black market overages on those cases were concededly greater than the payments he testified making to Gersh. But appellant purchased 5,138 cases of whiskey and only 200 cases remained unsold at the end of the taxable year. (Govt. Brief, p. 3.) Since all 5,138 cases were purchased in the black market, the absorption of large black market overages on the whiskey that was purchased above ceiling but resold at ceiling meant that appellant's operations were equalized at the wholesale level.

The Wolcher taverns concededly made substantial profits as a result of appellant's black market activities. As noted in Appellant's Closing Brief, p. 18, instead of having to pay black market prices the Wolcher taverns were able to purchase from appellant full supplies of case whiskey at ceiling prices. Their purchases at ceiling prices rather than black market prices was worth over $17,500 as a conservative estimate, even assuming purchases at the black market overages paid by appellant. The saving is even greater if the ceiling price is compared with the $60 black market prices paid by other San Francisco taverns. But there has not even been a suggestion, and there could be none, of understatement of income in the returns filed for these taverns.

(2) In stating that the new evidence would corroborate appellant only as to a portion of these black market receipts,—

(a) *This Court erroneously doubled appellant's black market receipts by mistakenly including therein the amounts of the checks to the San Francisco wholesalers making the deliveries;*

The Court refers to appellant as "illegally receiving some $200,000" in black market money. That is incorrect.

That figure results from jumbling together the black market cash payments which the tavern owners (of the taverns other than the Wolcher taverns) paid to appellant with the payments made by check by those tavern owners to the San Francisco wholesalers delivering the whiskey.

As this Court noted in an earlier opinion, the full ceiling price was covered by check payable to the San Francisco wholesaler, and only the amount over ceiling was paid, in cash, to appellant. *Wolcher* v. *United States,* 200 F. 2d 493, 495 (9th Cir.)

Mr. Schnacke's trial summation (part of the record on this appeal, see R. 5, 66) added up all the overceiling cash payments that the Government established to have come to appellant. (P. 3 et seq. of Mr. Schnacke's opening argument, August 31, 1953.) This came to $88,853.71 cash receipts to appellant on the Eastern whiskey, and only $6,150.00 on the West Coast whiskey. (Itemized, p. 5 of the Appellant's Opening Brief.)

And these cash receipts by appellant of approximately $90,000 of course do not take into account any overceiling payments made by appellant to obtain the whiskey.

(b) *This Court erroneously ignored the substantial amounts documented at the first trial as payments by appellant to Gersh, and failed to consider the significance of the newly discovered evidence in the light of this background. All this evidence taken together corroborates payments to Gersh accounting for the overwhelming bulk of appellant's black market receipts.*

In the next to the last paragraph of its opinion the Court says that the proposed new evidence would at most corroborate appellant's story as to a disposition of a portion of the black market money received, leaving a large amount unaccounted for except by appellant's testimony.

This Court erred in failing to take into account the evidence at the first trial. At the first trial Gersh acknowledged handling $85,000 received from appellant Wolcher. See *Wolcher* v. *United States,* 200 F. 2d 493, at page 495:

> "Gersh was called as a rebuttal witness for the Government and while he stated that in 1943 he had handled money belonging to Wolcher in amounts totaling $85,000, his version was that the money was sent to him to obtain coin machines for Wolcher. His testimony was that at that time coin machines were very difficult to procure, and that they could be bought only by cash payment in advance of the full purchase price. This, he said, was why Wolcher sent him these sums of money. He testified that he bought ten phonographs for Wolcher during this period, the purchase amounting to $5250, but that he had returned all the balance of the $85,000 to Wolcher."

In that case this Court held that the trial court had erroneously excluded evidence offered by Wolcher to rebut Gersh's testimony that coin machines required cash payment in advance. This court stated: (200 F. 2d at p. 499):

> "We think this evidence was material. It would have had weight in determining the question whether

> Wolcher or Gersh was telling the truth with respect to why the money was sent by Wolcher. It should have been admitted."

This Court has already recognized the significance of evidence impeaching Gersh's explanation of coin machines. Obviously the newly discovered evidence is far more significant since it goes beyond demolishing Gersh's explanation and affirmatively corroborates appellant's account of whiskey black market payments.

The record of the first trial (No. 12992) is of course in the file of this Court. The relevant portions of Gersh's testimony in the first trial (No. 12992) appear in the appendix to the petition for certiorari, filed in the Supreme Court on May 13, 1955, which was incorporated into the record of this proceeding (R. 14919, pp. 5, 67-68).

Gersh's testimony as to receipts of checks and cash from Wolcher was confined solely to the items which he could not deny receiving, because they appeared in his bank records which were in evidence and in the courtroom at the first trial. At the second trial the jury did not even have before it this evidence as to Gersh's receipts from Wolcher.

Appellant is not being treated justly if the newly discovered evidence alone is appraised without taking into account the previously available evidence adduced at the first trial. Although appellant cannot here complain of the rulings making unavailable to the second jury the evidence adduced at the first trial,[1] he is entitled to have

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[1] Defense counsel was prevented from questioning the revenue agent in charge concerning the payments by Wolcher to Gersh that had been documented at the first trial. This time the Government released Gersh from subpena, without notice to defense counsel, and did not call him in rebuttal. The case was submitted. In the midday recess before arguments to the jury, defense counsel learned that Gersh was nevertheless in fact in San Francisco, and he promptly asked to reopen the trial so that he might summon Gersh to identify his bank records. The trial court denied leave, and this Court affirmed on the ground that such a ruling was a matter of discretion for the trial judge. *Wolcher* v. *United States*, 218 F.2d 505.

the previously available evidence and the newly discovered evidence, which are interrelated, considered as one in this motion. Although considered separately each may be unavailing, taken together they provide requisite corroboration of appellant's defense in two vital respects in which Wolcher and Gersh differed. The newly discovered evidence should not be considered in isolation; it should be considered in the light of the totality of the evidence which appellant will present at a new trial.

1. Purpose. Gersh's admission in the first trial of receipts of cash and checks from appellant did not support appellant's testimony as to the *purpose* for which the money was sent to Gersh. Now appellant's otherwise unsupported testimony of payments to Gersh for whiskey black market purchases—an activity Gersh completely denied—is corroborated by Corriston's newly discovered testimony.

2. *Amounts.* But Corriston's evidence does more than corroborate Wolcher on the purpose of the amounts admittedly received by Gersh. It corroborates Wolcher in another important respect, namely, Wolcher's testimony, which Gersh disputed, as to the *amount* Gersh received from Wolcher.

At the first trial Gersh's bank account established, and Gersh was forced to admit, receipts of large amounts which Wolcher testified he sent to Gersh. The following table shows the extent to which Gersh corroborated receipts from Wolcher.

Wolcher Testimony of Payments to Gersh (References to Record No. 14109)	Gersh Corroboration (References to Record No. 12992; References to Appendix C, Refer to Appellant's Petition for Certiorari, No. 77, October Term, 1955)
$ 5,000 by check in June[2] 1943 (R. 358, 363)	R. 12992, pp. 559, 585 Appx. C, pp. 20a, 27a
3,300 cash by mail, Aug. 1943 (R. 359)	R. 12992, p. 586 Appx. C, p. 28a
5,000 cash by mail, Aug. 1943 (R. 461)	R. 12992, p. 587 Appx. C, pp. 28a, 29a
12,500 cashier's check bought for cash, Sept. 1943 (R. 378-9)	R. 12992, p. 587-8 Appx. C, p. 29a
60,000 personally delivered Nov. 1943:[3] $30,000 by draft; $30,000 in cash (R. 360-1, 371-2)	Gersh claimed he handled the $30,000 bank draft only to cash same for Wolcher. He denied receipt of the $30,000. R. 12992, pp. 560-563, Appx. C, pp. 20a-22a, 29a-32a
30,000 cash by express, Jan. 1944 (R. 362)	R. 12992, p. 592-3, Appx. C, pp. 32a-33a

[2] NOTE: Appellant testified that he and Gersh arranged for payment for the two instances in June and September when appellant used checks in a way that was traceable to appellant's books. R. 14109, pp. 364, 380; 403-5. Accordingly $35,000 was repaid to appellant—partly through Gersh purchase of coin equipment. R. 12992, pp. 560-562, Appx. C. pp. 20a-22a.

[3] Ibid.

At the first trial the great clash between Wolcher and Gersh concerning amounts, arose with respect to Wolcher's testimony that he personally delivered $60,000 to Gersh in November 1943—$30,000 in cash, and $30,000 in a bank draft. (R. 14109, pp. 360-361; Dft. Exh. F, pp. 371-2). Gersh testified that he only handled the $30,000 draft for the purpose of cashing the check for appellant.[4] Gersh

[4] R. 12992, pp. 560-563, 588-592, Appx. C, pp. 20a-22a, 29a-32a.

denied either having retained the $30,000 of the bank draft or having received the $30,000 in cash. Corriston's testimony clearly corroborates Wolcher on this receipt of $60,000 by Gersh for whiskey black market purchases. For only Wolcher's testimony—and not Gersh's—could account for Gersh's ability to arrange for the $50,000 overage.

At the meeting attended by Corriston in November or December 1943, Gersh not only paid a $10,000 deposit, but also stated his intention to pay the balance of the necessary $50,000 out of cash on hand.

Wolcher is therefore corroborated as to payments to Gersh of $80,800 in cash, and a cashier's check purchased with cash. (This is in addition to the corroboration of his payments of $35,000 to Gersh by check traceable to his books, which amounts Gersh returned to him to cancel book entries.)

That figure of $80,800 accounts for more than 90 percent of the amount ($88,853.71) that Mr. Schnacke established as appellant's overceiling receipts on the resale of the Eastern whiskey. (See point (a), above, p. 4.)

(3) Moreover, it was unjust and unwarranted for this Court to depart from the basis on which the case for conviction was submitted to the jury—that appellant's testimony of sending cash to the East for black market payments was a fabrication—and to speculate that, even with corroboration of appellant's testimony on this basic point, the jury might find appellant guilty on a different hypothesis.

The case for conviction was submitted to the jury on the basis that appellant's testimony that he sent large amounts of money to Gersh for black market whiskey payments was a fabrication.

The District Judge charged (R. 14109, pp. 482-3):

> "Now I think it might be well if I very briefly stated to you what the Court believes is the issue of the case as it appears from the contentions respect-

ively of the parties—the Government on the one hand and the defendant on the other hand. The Government contends, as appears from the argument made by Government counsel, that the cash monies that the Government proved the defendant received from the sale of liquor and which the defendant admitted that he received, were income and were net income, and that the whisky was purchased for the purpose of making a profit on it in its resale and not for the benefit of the defendant's own taverns, or his friends'. The Government contends that there were no records of the transaction kept by the defendant, and that that was so that he could keep the proceeds without paying any tax on them. The Government contends, as stated by the Government lawyer, that the defendant's account of sending large amounts in cash through the mail and otherwise to someone in the East is a story that is fabricated and should not be believed by you. That, I think very briefly, is the Government's contention."

The prosecuting attorney put it this way in his summation:

1. Appellant showed a net transfer to Gersh of $12,500 by check. But Gersh was in the coin machine business, and handled coin machine transactions for appellant. There is no evidence whatever other than appellant's testimony, not a word in correspondence or books, to connect Gersh with the alleged black market whisky purchases. (R. 14919, pp. 7-8, par. (c).)

2. There is only appellant's unsupported word for this fantastic story of cash shipments to Gersh, by mail or express, without any record or receipt. If any such amounts of cash were sent, would they be sent in this fantastic fashion? (R. 14919, p. 7, par. (b).)

As already noted, the second jury was not even aware of the fact that Gersh's documentary bank deposit records showed, and that Gersh accordingly admitted, that appellant sent him $3,300 cash by mail (deposit entry August

11, 1943); $5,000 cash by mail (deposit entry August 31, 1943); and $30,000 cash by express (deposit entry, January 4, 1944). Gersh had admitted this to the revenue agents, and in his testimony reviewing his bank records as prosecution rebuttal witness at the first trial.

In view of the basis on which appellant's conviction was obtained, it is unjust and unwarranted for this Court to speculate that with the new evidence corroborating appellant, a jury would convict on a different theory.

The salient corroboration of appellant's testimony in the newly discovered evidence inevitably supports appellant's testimony viewed as a whole. It comports neither with fairness nor experience to speculate that a conviction obtained on the basis that appellant's defense, resting solely on defendant's uncorroborated testimony, was a fabrication out of whole cloth, would persist in the face of the total corroboration of appellant's testimony. Appellant's testimony would be corroborated both (a) as to the purpose of his payments to Gersh, the important link previously missing, and (b) as to the amounts he paid to Gersh, for the $60,000 delivery previously denied Gersh is now corroborated by Corriston. Taken together with the amounts admitted by Gersh at the first trial, the corroboration relates to the vast bulk of appellant's black market receipts.

As for the previous verdicts, at the first trial the Government produced Gersh in rebuttal but the material evidence impeaching Gersh's coin machine explanation was excluded. At the second trial, the jury recommended leniency without even being aware of the bank records establishing Gersh's receipt of substantial sums of cash. Appellant's testimony that he made black market whiskey payments, primarily in cash and largely through the mail, to a certain Mr. Gersh, a man otherwise identified merely as a man in the coin machine industry, was peculiarly vulnerable to the prosecution charge that it was a pure fabrication.

There is no warrant for concluding that a guilty verdict would be rendered by a jury considering all the evidence which would be available on a new trial. As Justice Douglas said, the newly discovered evidence is "probative of a crucial fact issue" and "might well tip the scales in defendant's favor, as it goes to the heart of the case." (Opinion, Dec. 31, 1955; Opening Brief, p. 32.)

(4) The Court misunderstood the significance of and extent to which the defense made by appellant now stands corroborated.

Appellant paid taxes on $66,000 income. The indictment charged evasion of taxes on an additional $30,000 income. The prosecutor claimed proof of approximately $90,000 additional income. The great bulk of the whiskey involved was Eastern whiskey, and appellant testified as to payments made to Gersh to obtain that whiskey in the black market. Appellant's defense of payments to Gersh to obtain the whiskey in the black market was totally uncorroborated. As the prosecutor pointed out, there was nothing other than appellant's unsupported testimony to connect Gersh with whiskey black market purchasing or to show that appellant sent him cash for this purpose. Now Corriston's newly discovered evidence provides the corroboration that was previously missing as to the purpose of appellant's payments to Gersh, and strongly corroborates Wolcher, as opposed to Gersh, concerning amounts over and above those admittedly received by Gersh.

Appellant's testimony shows that his black market activities resulted in a *retail* gain of at least $17,500 for the Wolcher taverns, but there was no contention that income for those taverns was understated. This Court appears to have misunderstood the extent to which Corriston's testimony corroborates appellant's. It erroneously doubled the amount of appellant's black market receipts, and did not consider both the new and the old evidence concerning payments. A reconsideration of the full record should, we believe, lead this Court to modify and

strike as unwarranted its conclusion that a new trial would lead to the same result.

B. THE COURT'S AFFIRMANCE WOULD ERRONEOUSLY PLACE ON APPELLANT THE BURDEN OF PROVING INNOCENCE.

It is respectfully submitted that if after reconsideration of the factual record this Court adheres to its conclusion that no different result would be reached at a new trial, it will in effect, and erroneously, be placing upon defendant the burden of showing his innocence.

On a motion for new trial defendant should not be required to establish his innocence. He must merely show a likelihood that the new trial will result in acquittal. That standard requires that on a new trial he will adduce evidence likely to create a reasonable doubt of guilt. In Judge Chesnut's phrase, the governing requirement is that the evidence be "substantial in the perspective of the case as a whole." *United States* v. *Frankfeld,* 111 F. Supp. 919, 923 (D. Md. 1953). The effective standard is reflected by Justice Douglas' opinion of December 31, 1955, which notes that Corriston's evidence, if admissible, is "probative of a crucial fact issue in the case" and "might well tip the scales in defendant's favor, as it goes to the heart of the case."

If this Court adheres to its conclusion that the new evidence will not result in acquittal, it will obviously not be ruling that the evidence is not substantial. It will rather be indicating a disinclination to grant a new trial unless appellant affirmatively establishes his innocence. Such a standard is improper and unwarranted.

C. THIS COURT EXCEEDED ITS PROPER FUNCTION AS AN APPELLATE COURT WHEN IT PURPORTED TO EXERCISE DISCRETION AS TO THE FACTS, ON AN ASSUMPTION OF ADMISSIBILITY OF EVIDENCE, DIFFERENT FROM THE BASIS OF THE RULING OF THE DISTRICT JUDGE.

The ruling of the district judge that the motion failed to set forth any "legal basis" for granting a new trial was based on a ruling that the Corriston evidence was inadmissible.

This Court ruled that the evidence is inadmissible. That ruling was within the province of this Court, although we respectfully pray that it be reconsidered.

This Court exceeded its appellate province, however, in concluding that, even assuming that the evidence was admissible, a new trial should be denied in the exercise of discretion. That conclusion put this Court in the position of assessing the impact of the newly discovered evidence upon the evidence previously introduced and available, and of doing so without the district judge having exercised discretion as to the facts on the assumption that the evidence was admissible.

On a motion for a new trial, the probative weight of newly discovered facts is initially committed to the trial court's discretion. The appellate court's function is to review only for an abuse of discretion and to be guided in that function by the elements taken into account by the district judge in the exercise of his discretion. Indeed, if the district judge—on an assumption of admissibility—granted a new trial, this court would not even have occasion to consider the exercise of discretion involved, since there would be no appeal by the Government.

As already indicated, even assuming the Court continues to hold the evidence inadmissible, appellant requests that the Court adhere to its proper appellate function. The reason is that appellant desires to present the legal questions of evidence to the Supreme Court.

II. HOLDING CORRISTON'S TESTIMONY INADMISSIBLE PRECLUDES EVIDENCE THAT IS ESSENTIAL TO A JUST VERDICT. EVEN UNDER THE DOCTRINE ANNOUNCED BY THE COURT CORRISTON'S TESTIMONY IS ADMISSIBLE. AND THAT DOCTRINE IS NARROWER THAN THE AUTHORITIES INCLUDING DECISIONS OF OTHER COURTS OF APPEALS.

The Court's opinion has the effect, not only for this case but for future criminal proceedings, of shutting the eyes of judges and juries to evidence that is essential to a just verdict. Such a result should not be countenanced unless it is required by settled law. There is no such requirement in this case.

The prosecution's proof was based fundamentally upon appellant's activities in the whiskey black market. The defense is that when appellant's whiskey black market activities are taken as a whole, they negate income tax evasion. The defense rests upon the facts concerning the nature and extent of Gersh's role in their common whiskey black market activities. The Court's opinion in effect limits appellant to his own testimony, which is naturally suspect. Gersh gave opposing testimony at the first trial, in an effort to exculpate himself from receipt of black market whiskey money. Corriston's testimony would show what it was that Gersh did and said during the course of their common whiskey black market activities. As the authorities have often noted, such contemporaneous evidence is likely to be even more reliable than Gersh's subsequent testimony.

A. THE COURT FAILED TO GIVE CONSIDERATION TO APPELLANT'S CONTENTION THAT CORRISTON'S TESTIMONY WAS ADMISSIBLE TO SHOW GERSH'S VERBAL ACTS EITHER WITHOUT REGARD TO ANY TESTIMONIAL USE (TO PROVE THE TRUTH OF WHAT GERSH SAID), OR UNDER A PERMITTED HEARSAY USE RELATING TO STATEMENTS OF INTENTION.

The Court's opinion fails to give consideration to appellant's contention that Corriston's testimony is admis-

sible even if strictly limited to a showing as to what statements were made by Gersh, without regard to a testimonial use attempting to establish the truth of what Gersh said; and is, in any event, admissible under the hearsay exception relating to statements of intention. (Appellant's Opening Brief, p. 18, par. 1; p. 21, par. 3; Appellant's Closing Brief, p. 6.)

Appellant testified concerning large payments to Gersh. There was no dispute that appellant sent Gersh $47,500 by check, of which $35,000 was returned. As already noted, the jury was not advised of the large cash transfers by appellant that were established by Gersh's own bank records at the first trial.

The prosecution argued to the jury that Gersh was shown to be in the coin machine business and not the whiskey business, that indeed appellant testified that Gersh had handled such coin equipment for appellant, and that there was nothing apart from appellant's uncorroborated testimony to show that Gersh was involved in whiskey black market activities. (R. 8.)

1. Corriston's testimony is admissible, to show how active Gersh was in the whiskey black market, without in any way involving a hearsay or testimonial use of Gersh's statements.

a. Corriston testifies that Gersh solicited him on two different occasions to obtain black market whiskey.[5] He is testifying as to Gersh's words, to be sure, for solicita-

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[5] (a) Gersh first solicited Corriston in the late spring of 1943. Corriston testifies: Gersh asked me where he could get a quantity of whiskey for Wolcher, and to convince me that he was seriously interested he showed me a wad of hundred dollar bills. (R. 14.)

(b) In November or December, 1943, Gersh called me for lunch, said the previous contract had petered out, that Wolcher needed an ample supply of whiskey for the holiday season, and asked me for further ideas where he could get it. (R. 14-15.) Corriston then established a contact with Taylor as the source of supply. (R. 15.)

tions are words. Gersh's words are not used testimonially to prove the truth of the words uttered but rather to prove that Gersh actually uttered these words of solicitation.

b. As the middleman between Gersh and Taylor, the man supplying the whiskey, Corriston testifies that in the negotiation to set up a further meeting he advised Gersh that it was necessary to assure Taylor that Gersh was good for $50,000 in cash, with a $10,000 advance deposit. (R. 15.)

c. Corriston testifies that at the resulting meeting Gersh paid Taylor a $10,000 deposit. (R. 15-16.)

d. Corriston testifies that at the resulting meeting Gersh gave assurances to Taylor of $50,000 cash on hand and entered into an agreement to pay Taylor the additional $40,000. (R. 16.)

The foregoing is not the use of hearsay. The purpose is to prove that Gersh actually did these acts and make these statements, for these statements are themselves "verbal acts" of solicitations, negotiations, assurances, and agreements relating to the common venture of Gersh and Wolcher in the purchase of black market whiskey. Corriston's testimony is admissible without regard to the truth or falsity of Gersh's statements for the mere fact that he made these statements and did these acts is proof of Gersh's black market activities which is unquestionably relevant and material.

2. Insofar as these statements by Gersh are considered to involve a possible testimonial use, it is permissible under the hearsay exception relating to statements of present intention—Gersh's intention to buy and pay cash for substantial volumes of black market whiskey. Indeed, under that exception Corriston's testimony that at the restaurant meeting with Taylor, Gersh stated his readiness to pay an additional $40,000 cash upon shipment, is admissible to show not only Gersh's expressed intent at the time but

also, as a matter of circumstantial evidence, that Gersh later paid that money in accordance with his expressed intent. See *Mutual Life Ins. Co.* v. *Hillmon,* 145 U.S. 285 (1892).

Gersh's readiness in November or December 1943 to pay $40,000 cash, in addition to a $10,000 cash deposit, for black market whiskey is particularly corroborative of appellant's defense in view of appellant's testimony that he delivered $60,000 to Gersh early in November, 1943 (R. 14109, pp. 360-1), whereas Gersh testified he had only handled $30,000 at that time and merely for the purpose of cashing a check for appellant. (See fn. 4, p. 8, *supra.*)

B. IN ADDITION, TESTIMONIAL USE OF GERSH'S STATEMENTS TO ILLUSTRATE THE CHARACTER OF HIS BLACK MARKET ACTIVITIES AS MADE FOR APPELLANT'S BENEFIT IS PERMISSIBLE UNDER THE DOCTRINE APPLIED IN OTHER COURT OF APPEALS DECISIONS TREATING RES GESTAE DECLARATIONS AS AN EXCEPTION TO THE HEARSAY RULE.

By far the major part of Corriston's testimony is admissible under the foregoing rules. The only declarations of Gersh which may possibly involve a hearsay use not covered by those rules are those in which Gersh states that he was acquiring the whiskey for appellant. The authorities make clear, however, that Corriston's testimony is not thereby rendered inadmissible.

Appellant's opening brief cites the three cases referred to in footnote 2 of the Court's opinion. Appellant's closing brief, in responding to the Government's brief, cites other decisions to which the Court does not refer, particularly *Chicago M. & St. P. Ry. Co.* v. *Chamberlain,* 253 Fed. 429 (9th Cir.), and *Aetna Ins. Co.* v. *Licking Valley Milling Co.,* 19 F. 2d 177 (6th Cir. 1927), which rely on the res gestae doctrine as set forth in Wharton on Evidence. Under this doctrine, extra judicial declarations which are contemporaneous with or grow out of acts in issue, serve to illustrate their character, and are so nearly

connected with them as to form part of the transaction, are admissible in evidence.

After pointing out that Gersh's res gestae declarations are admissible without any testimonial use dependent on establishing the truth of what Gersh said, appellant stated (closing brief, p. 7):

> "Second, although res gestae declarations are not admissible merely because of their testimonial use, if they are admissible as the incidents of an act or transaction in issue—here the black market activity—they may be used testimonially insofar as they describe the nature or character of the incidents—black market purchases for the benefit of Wolcher. This is plain from the *Chamberlain* and *Aetna* cases cited above, and from *Insurance Co.* v. *Mosley,* 8 Wall. 397 (1869), and the other cases cited in appellant's opening brief.

In the *Aetna* case, the issue was whether an insurance policy had become effective. Plaintiff agreed to place insurance on its mill with one Bennett, an insurance agent, who did not have an agency for the Aetna company. Plaintiff's manager testified in his presence that Bennett, who represented plaintiff, telephoned someone, identified to him by Bennett as Aetna's agent Stone, and that "after the conversation over the 'phone, he [Bennett] told me the insurance was in effect." This testimony was admitted over defendant's objection, and on appeal the court held, on the authority of the *Chamberlain* case among others, that

> "the statement was admissible as part of the res gestae, for we interpret the manager's testimony as a whole as meaning that Bennett's statement was made at the close of the telephone conversation." (19 F. 2d at 179.)

The court cited its earlier opinion in *Tuckerman* v. *United States,* 291 F. 958 (6th Cir. 1923), cert. denied, 263 U.S. 716, a prosecution for bribery. There the declaration of a husband to wife following receipt of a

bribe from defendant, to the effect that defendant had given him the money, was held admissible. That declaration, the court said, was a "contemporaneous statement directly relevant to the primary fact of [defendant's] payment of money, a fact not only natural, but important to be stated to [the wife], who was to give clearances." 291 F. at 970.

In *Aetna* the court held, citing *Tuckerman,* that Bennett's declaration was admissible even though the declaration did not occur on an exciting occasion and declarant was not a party to the case. The court continued (19 F. 2d at 180):

> "The above comment on the Tuckerman case is substantially applicable to Chicago, M & St. P. Ry. Co. v. Chamberlain (C.C.A. 9) 253 F. 429, 430 (where the statement in question was made by plaintiff before the accident, and in the absence of shock, stress, or excitement, and was described by the court as being 'in immediate causal relation to the act—a relation not broken by the interposition of a voluntary individual wariness seeking to manufacture evidence for itself'; St. Clair v. United States, 154 U.S. 134, 149, 14 S. Ct. 1002, 38 L. Ed. 936, where the court cites with approval the definition of res gestae found in 1 Wharton on Evidence (2d Ed.) § 259, 1879.[3]"

"[3] The 'res gestae may be, therefore defined as those circumstances which are the undesigned incidents of a particular litigated act, and which are admissible when illustrative of such act. These incidents may be separated from the act by a lapse of time more or less appreciable. They may consist of speeches of any one concerned, whether participant or bystander; they may comprise things left undone as well as things done. Their sole distinguishing feature is that they should be the necessary incidents of a litigated act; necessary in this sense, that they are part of the immediate preparations for or emanations of such act, and are not produced by the calculating policy of the actors. In other words, they must stand in immediate casual [causal] relation to the act—a relation not broken by the interposition of voluntary individual wariness seeking to manufacture evidence for itself. Incidents that are thus immediately and unconsciously associated with an act, whether such incidents are doings or declarations, become in this way evidence of the character of the act.' This definition is in substance the opening paragraph of the definition of res gestae in Words and Phrases."

Gersh's statements both (1) are illustrative of the character of his black market purchases,—as made in appellant's behalf and not for his own account, and (2) are causally related to the black market purchases, since they were made first as part of Gersh's efforts to induce Corriston to act as middleman, and second to assure Corriston that he, Gersh, had the necessary cash to consummate the purchases.

This Court should recognize, as Professor Morgan suggests, that the

> "rational basis for the hearsay classification is not the formula, 'assertions offered for the truth of the matter asserted,' but rather the presence of substantial risks of insincerity and faulty narration, memory, and perception." (Morgan, "Hearsay Dangers and the Application of the Hearsay Concept," 62 Harv. L.R. 177, 218 (1948).)

Gersh's statements to Corriston in the course of his black market activities are equally if not more reliable than Gersh's present testimony. They were not self-serving when made. By their very nature they did not reflect a "wariness seeking to manufacture evidence for itself." Both on authority and sound policy, Corriston's testimony as to what Gersh said and did in the course of black market activities is admissible.

C. GERSH'S STATEMENTS TO A MIDDLEMAN (CORRISTON) MADE DURING THEIR PARTICIPATION IN THE BLACK MARKET ACTIVITIES ARE ADMISSIBLE AS PART OF THE RES GESTAE OF THE BLACK MARKET CONSPIRACY WHETHER OFFERED FOR OR AGAINST A CO-CONSPIRATOR.

The Court's opinion holds that Gersh's statements are not admissible as declarations of a co-conspirator, since such declarations are admissible solely as vicarious admissions. That is one basis, but it is not the only basis for admitting the declarations of a co-conspirator.

The precise question in this case is one of first impression in the Federal courts, and is not governed by settled

Federal decisions. However, there is Federal precedent to establish that statements of a co-conspirator made during and as part of the course of the conspiracy, and relating to its object, are admissible as part of the res gestae of the conspiracy. And there is general authority for the view that statements that are part of the res gestae of the conspiracy are admissible in favor of as well as against a co-conspirator.

The question is therefore an open one,—and not foreclosed as Wigmore would imply. The Court is accordingly respectfully requested to reconsider its position in the light of these decision precedents.

There are clear statements that declarations of a co-conspirator are admissible as constituting part of the res gestae of a conspiracy if the declarations relate to the object of a conspiracy and are made while the conspiracy is in progress. See *American Fur Co.* v. *United States,* 2 Pet. 358, 364-5 (1829); and other cases analyzed in *Jones* v. *United States,* 179 Fed. 584 (9th Cir. 1910).

Although the precise question has not arisen in the Federal courts, there is other authority that declarations of a co-conspirator that are part of the res gestae of a conspiracy are admissible in favor of as well as against the other co-conspirators.

The rule is noted as follows in 22 C.J.S., Criminal Law, sec. 777, and also 16 Corpus Juris, Criminal Law, pp. 668-9, cited at p. 8 of appellant's closing brief:

> "Sec. 777. Where several persons participate in the actual commission of a crime, the acts and declarations of any one of them, while so participating, are admissible against all the others. (72) It is sometimes intimated that such evidence is received under the rule with respect to the acts or declarations of co-conspirators and codefendants, but as such evidence is frequently received when the circumstances are such that the limitations of the rule mentioned would pre-

> clude its reception, it is apparent that the real reason for the admission of the evidence is that such acts or declarations constitute a part of the res gestae (73), a view which is confirmed by the fact that such evidence is admitted in favor of the accused person on trial (74). Such evidence is admissible even when the indictment does not charge conspiracy (75). So also a declaration which is not of itself in furtherance of the common design may be admitted where it constitutes a part of the res gestae of acts done in furtherance thereof (76). Likewise declarations of one conspirator in favor of a fellow conspirator are admissible when a part of the res gestae (77). However, it is essential that such acts or declarations be a part of the transaction in question (78).

The underlying cases include several cases cited in appellant's closing brief (pp. 7-8) where the court specifically overruled the contention that declarations of one co-conspirator could not be evidence in favor of another. *Rex* v. *Whitehead,* 171 Eng. Rep. 1105 (1824); *Meador* v. *State,* 72 Tex. Cr. 527, 162 S.W. 1155 (1914); and *Zellerbach* v. *Allenberg,* 99 Cal. 57, 33 Pac. 786 (1893).

Appellant's closing brief (p. 8) further pointed out:

> "that declarations of an agent made in connection with a transaction are admissible in evidence as part of the res gestae, even though offered in favor of the principal. 32 C.J.S., Evidence, sec. 410; *Aetna Ins. Co.* v. *Licking Valley Milling Co.,* 19 F. 2d 177 (6th Cir. 1927); *American Ins. Co.* v. *Lowry,* 62 F. 2d 209 (5th Cir. 1932). Men who enter into concert for an unlawful end 'become *ad hoc* agents for one another and have made a partnership in crime.' *United States* v. *Pugliese,* 153 F. 2d 497, 500 (2d Cir. 1945); see *Cosgrove* v. *United States,* 224 F. 2d 146 (9th Cir. 1955)."

The proposition is set forth in 32 C.J.S., Evidence, sec. 410, p. 28, as follows:

> ". . . declarations of an agent made at the time of a particular occurrence or transaction, or near enough

> thereto to form a part thereof, which tend to explain or illustrate it, made while the agent is acting within the scope of his authority, may be given in evidence as part of the res gestae, either *for* or against the principal or employer." (Emphasis supplied.)

The *Aetna Ins.* case is discussed above in this brief (pp. 19-20), and plainly establishes that a plaintiff may offer in evidence an extrajudicial declaration made to plaintiff by his agent at the time of a transaction, under circumstances without stress and excitement, as part of the res gestae.

As noted in appellant's closing brief (p. 10) the decision in *Nothaf* v. *State,* 91 Tex. Cr. 378, 239 S.W. 215, is entirely distinguishable since there the court rejected statements of an accomplice in jail. Those statements were thus made after the arrest had terminated the conspiracy.

In view of the authorities cited above, which the court has not discussed, it is plain that there is no settled rule of law prohibiting the admission of statements between co-conspirators during the working out of the conspiracy. Such precedents as consider the point have admitted the mutual declarations of co-conspirators, made during the conspiracy and relating to its objects, as part of the res gestae, in favor of as well as against a conspirator. The Federal courts should not adopt a more restrictive view, particularly where, as here, Gersh's statements to a middleman who was himself part of the conspiracy were not self-serving or in any way part exculpatory when made. Where declarations are mere naked statements, it might be sound to limit the basis of admissibility to the doctrine of vicarious admissions. But since these declarations were contemporaneous with and integrally and causally related to the conduct of the conspirators, reason, fairness, and justice indicate that they should be admitted as part of the res gestae of the conspiracy.

PRAYER

For the foregoing reasons it is respectfully prayed that this Court set the cause down for reconsideration and rehearing.

In the event that the Court refuses that prayer, it is prayed that the Court modify its opinion to strike the last four paragraphs.

In the event the Court fails to set the cause down for reconsideration and rehearing, whether or not it modifies its opinion, the appellant prays that this Court stay its mandate pending filing by appellant of a petition for certiorari in the Supreme Court of the United States and pending disposition by the Supreme Court.

Respectfully submitted,

Leo R. Friedman H.L.

LEO R. FRIEDMAN,
HAROLD LEVENTHAL,
Attorneys for Appellant.

June 14, 1956

Harold Leventhal

Certificate

I hereby certify that the foregoing petition for rehearing is well founded and is not inserted for purposes of delay.

Harold Leventhal

HAROLD LEVENTHAL.

June 14, 1956

No. 14,920

IN THE

United States Court of Appeals

For the Ninth Circuit

EDDIE L. BURDIX,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the District Court of the United States for the District of Alaska, Fourth Judicial Division.

APPELLEE'S REPLY BRIEF.

THEODORE F. STEVENS,
United States Attorney,
Box 111, Fairbanks, Alaska,
Attorney for Appellee.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

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No. 14,920

IN THE

United States Court of Appeals

For the Ninth Circuit

EDDIE L. BURDIX,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the District Court of the United States for the District of Alaska, Fourth Judicial Division.

APPELLEE'S REPLY BRIEF.

JURISDICTION.

Jurisdiction of the District Court was invoked pursuant to the Act of June 25, 1948, c. 646, 62 Stat. 966, as amended May 24, 1949, c. 139, sec. 114, 63 Stat. 105; 28 U.S.C. 2255.

Jurisdiction of this Court has been alleged by appellant under 28 U.S.C. 1291. Appellee submits that the jurisdiction of this Court is specifically set forth in 28 U.S.C. 2255. "An appeal may be taken to the Court of Appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus." This Court has no jurisdiction over this appeal.

STATEMENT OF THE CASE.

Appellant was charged in an indictment filed November 4, 1953, with possession and sale of heroin, a narcotic drug, in violation of Section 40-3-2, A.C.L.A., 1949. He was tried by a jury and convicted. Sentence was passed on May 18, 1954, requiring Burdix to serve five years imprisonment in the custody of the Attorney General. All proceedings herein took place in the District Court for the District of Alaska, Fourth Judicial Division. At the trial, the Honorable Harry E. Pratt, former District Judge, presided.

On November 11, 1954, Burdix filed a motion to vacate and set aside the judgment and sentence pursuant to 28 U.S.C. 2255. The District Court, the Honorable Vernon D. Forbes presiding, required the United States to appear and respond to Burdix's motion. (Appendix "A".) On March 4, 1955, said Judge denied this motion. (Appendix "B".) Burdix then sought to appeal in forma pauperis to this Court (the exact date of filing is unknown). This purported appeal was dismissed. (Misc. No. 423, March 21, 1955.) Burdix had filed a copy of his motion to this Court with the District Court. That Court treated said motion as having been properly filed there and denied the same, specifically finding that the appeal was not taken in good faith. (Appendix "C".) On April 27, 1955, appellee was served with a "Brief in Support of Appeal", wherein Burdix stated that he was appealing to this Court from the order dated March 4, 1955. (Appellee considered this brief

as having been filed in support of the motion denied March 21, 1955 by this Court.)

On June 21, 1955, appellee received a copy of a "Petition to Vacate and Set Aside Judgment," which had evidently been filed in this Court. Burdix also filed several motions for writs of mandamus in the District Court (see Appendix "D") and at least one petition for the same writ from this Court. On November 12, 1955, Burdix presented a petition to this Court for leave to appeal in forma pauperis, which motion was denied on December 2, 1955.

ARGUMENT.

I.

APPELLANT HAS NO VALID APPEAL BEFORE THIS COURT.

Burdix has failed to comply with Rule 73(a) of the Federal Rules of Civil Procedure, for no formal notice of appeal from the order of the District Court dated March 4, 1955, was ever filed with the District Court. Burdix did file a motion for leave to appeal from the judgment and commitment dated May 18, 1954, and this motion was denied. A motion for leave to proceed in forma pauperis, filed in this Court, may satisfy the requirement that a notice be filed within 60 days. (*West v. U. S.*, 222 F. 2d 774 (D.C. Cir. 1954).) However, the *West* case and other similar holdings (*e.g., Gerringer v. U. S.*, 213 F. 2d 346 (D.C. Cir. 1954)), resulted in the Court of Appeals giving the petitioner 10 days in which to file the appropri-

ate notice and motion in the District Court. In this case, the District Court has already specifically ruled upon Burdix's motion and denied the same. (Appendix "C".)

Appellant has, therefore, been denied the right to appeal in forma pauperis, even if his erratic procedure is deemed to have complied with Rule 73. He persists, however, in this proceeding. He has not, to appellee's knowledge, filed the record and documents required by the Rules of this Court and the Federal Rules of Civil Procedure. No transcript has been prepared. Instead, this Court is asked to review Burdix's version of the transcript and to accept his statements as to the proceedings below and the dates upon which he made his various motions. (Appellee, however, is also guilty of this procedure. No record having been prepared, appellee has attached hereto a copy of the government's response to Burdix's motion under 2255. Appendix "A".) Appellee fails to ascertain how he can be permitted to proceed in this fashion, particularly in view of the decision, dated December 2, 1955, in which this Court denied Burdix permission to proceed in forma pauperis. The defects in appellant's procedure may be excusable. (*cf., West v. U. S., supra,* p. 778.) However, appellee submits that if this Court reviews appellant's appeal on the record before it now, the precedent established may well open a veritable "Pandora's Box" which will plague this Court and lower Courts as well. A mere recitation of Burdix's motions, pleadings, and the various other documents filed to date demonstrates

that he has flooded this Court, the District Court, and the U. S. Attorney's office with frivolous and irrelevant material since he started this procedure. If, from all of this maze, the Court is to salvage a good appeal, without a transcript, without compliance with the applicable Rules, and with specific denial of appellant's right to proceed in forma pauperis having been made by both Courts, appellee believes that the purpose of Section 2255 will have been completely destroyed.

II.

THE DISTRICT COURT PROPERLY ~~DEEMED~~ DENIED APPELLANT'S MOTION UNDER 28 U.S.C. 2255.

Appellant's motion under 2255 and the appeal therefrom is not a substitute for an appeal. (*Taylor v. U. S.*, 177 F. 2d 195 (4 Cir. 1949).) This Court has no jurisdiction to entertain the motion filed here to vacate and set aside the sentence. (*Flynn v. U. S.*, 222 F. 2d 541 (9th Cir. 1955); *cf., Taylor v. Squier,* 183 F. 2d 67 (9th Cir. 1950).) All that is before this Court, if anything, is the appeal from the order dated March 4, 1955. In that order the District Court considered appellant's contentions that: (1) the government failed to show "continuity of possession" by the defendant of the heroin at the trial; (2) the trial Court had excluded all adults from the courtroom during trial and filled the courtroom with children "unquestionably to influence the jury"; (3) petitioner was not adequately represented by counsel be-

cause George McNabb, Esquire, volunteered to represent him; (4) the trial Court erred re the admission of evidence; and (5) the instructions to the Court were erroneous.

The District Court ruled:

> "After careful consideration of the motion and the files and records of the case, the Court concludes that the prisoner's petition is without merit and must be denied."

Appellant's brief demonstrates that he wishes this Court to review the whole trial and consider this an appeal on the merits. Section 2255 was not designed to substitute for an appeal; (*Taylor v. U. S.*, 177 F. 2d 195 (4 Cir. 1949); *Hudspeth v. U. S.*, 183 F. 2d 68 (6th Cir. 1950)); the remedy available under Section 2255 is no greater than that available by habeas corpus. (*cf., U. S. v. Hayman,* 342 U. S. 205 (1951).)

The only alleged constitutional violation presented here, which was reviewed by the District Court, is that the appellant was denied the assistance of counsel. His own brief sets forth that Mr. McNabb represented him all through the proceedings in the District Court. Mr. McNabb is an officer of this Court. In his motion presented to the District Court on November 11, 1954, Burdix stated:

> "After being in jail six or seven weeks, I was visited by George McNabb, Attorney at Law. I had met him previously while serving a party that he and some of his friends attended. Mr. McNabb offered me legal advice and assistance in helping me secure my release."

Appellant was represented by able counsel. He has made no showing that he was denied counsel or that he failed to assert constitutional rights because of ignorance. (*cf., Crowe v. U. S.,* 175 F. 2d 799 (4 Cir. 1949); *Alred v. U. S.,* 177 F. 2d 1948 (4 Cir. 1949).)

All other alleged errors related to errors committed by the trial Court, none of which raised a constitutional question, or are new allegations made for the first time on this appeal. As pointed out above, this remedy is not a substitute for an appeal, nor does this Court have jurisdiction to hear appellant's allegations under 2255 raised for the first time here.

CONCLUSION.

Appellee submits that this Court is without jurisdiction over the subject matter herein. If this Court should rule that the jurisdictional requirements have been fulfilled, then it is also submitted that the order of the Court below was proper.

Dated, Fairbanks, Alaska,
February 8, 1956.

Respectfully submitted,
THEODORE F. STEVENS,
United States Attorney,
Attorney for Appellee.

(Appendices "A", "B", "C" and "D" Follow.)

Appendices.

Appendix "A"

In the District Court for the District of Alaska
Fourth Judicial Division

United States of America, Plaintiff, vs. Eddie L. Burdix, also known as "Shorty the Barber", hereinafter referred to as Eddie L. Burdix, Defendant.	No. 1775 CR.

REPLY TO MOTION TO VACATE AND SET ASIDE JUDGMENT AND SENTENCE.

Comes now Theodore F. Stevens as attorney for the United States and replies to petitioner's contentions as follows:

I.

The first contention of petitioner deals with the so-called "chain of evidence" doctrine. No point was raised in this case that the government did not show continuity of possession. Melvin Austin testified that he purchased the drug from Burdix, whose actions were witnessed by two law enforcement officers. Neither officer actually saw the transaction, but both knew that Austin did not have the narcotic when he approached Burdix and that Austin did have the

narcotic when searched immediately upon leaving Burdix.

II.

Petitioner has not presented the true facts to the Court in his second contention. As shown by the attached affidavit, the court room was not cleared of adults or juveniles. During the afternoon of the trial, for a short period only, a group of students from the Fairbanks schools did visit the court room.

Petitioner's constitutional rights were not infringed upon by permitting these students to be present in the court room. No pressure was placed upon the jury by their presence.

III.

Mr. McNabb is a well known, able attorney. He certainly defended the petitioner in a vigorous manner. The very fact that Mr. McNabb volunteered to aid petitioner demonstrates Mr. McNabb's willingness to accept and perform his duties as an officer of this Court.

IV.

Petitioner's fourth contention is somewhat misleading. The Honorable LaDessa Nordale, U. S. Commissioner, was duly sworn and testified for the government. Upon cross-examination, defendant attempted to show that at the preliminary hearing, the case against Mr. Burdix was dismissed on motion of the government, arguing that such dismissal was a bar to further prosecution. The Court's implied ruling

that a failure to prosecute a preliminary hearing was not a bar to prosecution under an indictment found by the grand jury was proper. (Compare: 66-18-18, A.C.L.A., 1949)

V.

The instructions of this Court were clear and concise. Petitioner's fifth contention amounts to an objection that the Court did not direct a verdict of acquittal. Petitioner's objections in this paragraph of this petition are without merit.

CONCLUSION.

Petitioner, Eddie Burdix, was given a fair and impartial trial. He readily admitted his guilt, after the trial, and even attempted to help the Government by giving information concerning narcotics traffic in Alaska.

The Government contends that Mr. Burdix's petition is without merit and should be denied.

Dated at Fairbanks, Alaska this 15th day of December, 1954.

/s/ Theodore F. Stevens,
United States Attorney.

Filed. In the District Court,
Territory of Alaska, 4th Div.,
Dec. 15, 1954.
John B. Hall, Clerk,
By .....
Deputy.

AFFIDAVIT.

United States of America,
Territory of Alaska.—ss.

Theodore F. Stevens, being first duly sworn, on oath deposes and says:

That he is the United States Attorney for this Division and that he personally prosecuted the case of Eddie L. Burdix, who is also known as "Shorty the Barber".

That at the preliminary hearing in this case, George McNabb, Esquire, objected to the introduction of any evidence acquired from the informant, unless the informant be produced and testify. The evidence involved was the narcotic drug alleged in the indictment herein which Burdix was alleged to have possessed, controlled and sold. Mr. McNabb's objection was sustained and upon my motion the case against Mr. Burdix was dismissed. The informant was not available to testify at that time.

However, the Grand Jury for this Division subsequently indicted Mr. Burdix for the same crime. At the trial of this case, Mr. Burdix was ably defended by Mr. McNabb. The evidence disclosed that Robert R. Thompson, U. S. Deputy Marshal, and David Carpenter, Treasury Agent, had obtained the services of Melvin Austin as an informant and that Austin had agreed to purchase heroin from Eddie Burdix. The two law enforcement officers searched Austin and then watched his actions as he met with Burdix. After keeping both Austin and Burdix under surveillance,

Austin was observed leaving Burdix and was immediately apprehended and searched. At that time the officers took from Austin's person the heroin subsequently introduced into evidence. Austin was brought before the Court at the trial. He testified about the transaction and identified the heroin as being the narcotic purchased by him from Burdix.

Burdix took the stand himself and insisted that he be able to narratively tell his story. He acted against the advice of his counsel and voluntarily disclosed irrelevant and immaterial matters.

Further, the Court was not cleared of adults. A few school children, from the local schools, visited the court room as a part of their "government" class. This visit occurred in the afternoon of the trial. These children did not exert pressure upon the jury, nor was their visit in any way connected with the prosecution of the case against Burdix.

The defendant was convicted on a verdict of guilty. He was sentenced to five years in an institution of a penitentiary type. The jury was comprised of four men and eight women. This jury panel was selected in accordance with the laws of Alaska on the subject.

After sentence, Mr. Burdix requested that he be permitted to confer with Mr. Thompson, Mr. Carpenter, and your affiant. A conference was held in the United States Attorney's Office. Mr. T. R. McRoberts, Acting U. S. Marshal, was also present. At that time, Mr. Burdix freely admitted that he had sold heroin to Austin, that he sold the heroin referred to in the

indictment to Austin and that he had also sold drugs to others. Burdix admitted occasional use of marijuana. The parole report filed by your affiant herein reflects that both his admission of guilty and use of narcotics was reported on the 28th day of May, 1954.

Dated at Fairbanks, Alaska this 15th day of December, 1954.

/s/ Theodore F. Stevens,
United States Attorney.

Subscribed and sworn to before me this 15th day of December, 1954.

/s/ Wallis C. Droz,
Notary Public in and for the Territory of Alaska. My commission expires: 4-16-58.

Appendix "B"

United States District Court, Territory of Alaska
4th Judicial District

Eddie L. Burdix, Defendant, vs. United States of America, Plaintiff.	No. 1775

ORDER.

The Court has very carefully studied the motion of the prisoner, Eddie L. Burdix to vacate and set aside judgment and sentence.

As the Court views the showing made by the prisoner he does not claim that the sentence in his case was imposed in violation of the Constitution or laws of the United States or that the Court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or does he set forth a showing that the sentence was or is otherwise subject to collateral attack. The showing of the prisoner is confined to the insufficiency of the evidence and claimed errors of the Court during the trial.

After careful consideration of the motion and the files and records of the case, the Court concludes that

the prisoner's petition is without merit and must be denied.

Dated at Fairbanks, Alaska, this 4th day of March, 1955.

/s/ Vernon D. Forbes,
District Judge.

Appendix "C"

In the District Court for the District of Alaska
Fourth Judicial Division

Eddie L. Burdix, Defendant, vs. United States of America, Plaintiff.	No. 1775

ORDER DENYING MOTION TO PROCEED IN FORMA PAUPERIS.

This cause coming on before the Court upon the application of Eddie L. Burdix to be allowed to prosecute his appeal herein in forma pauperis, supported by the affidavit of Eddie L. Burdix, it is

Ordered that the application be and is hereby denied, and this Court certifies, pursuant to Section 1915 of Title 28 of the United States Code, that, in its opinion, the appeal is not taken in good faith.

Dated at Fairbanks, Alaska, this 6th day of May, 1955.

/s/ Vernon D. Forbes,
District Judge.

Filed. In the District Court,
Territory of Alaska, 4th Div.,
May 6, 1955.
John B. Hall, Clerk,
By .....
Deputy.

Appendix "D"

In the District Court for the District of Alaska
Fourth Judicial Division

Eddie L. Burdix, Petitioner, vs. United States of America, Respondent.	No. 1775

OPINION.

Burdix has moved this court for an order directing the clerk of court to "immediately observe and comply with the requirement and specifications prescribed in Rule 75, Title 28, U.S.C. and forward to the United States Court of Appeals, 9th Circuit, . . . the requested records on appeal . . ."

Although Burdix's intention is not clear, it appears to be that the clerk of court has failed to forward to the Court of Appeals the transcript of the record. Burdix has been denied leave to appeal in forma pauperis, and makes no showing that the transcript requested has been transcribed by the court reporter and delivered to the clerk. Title 28, sec. 753.

The petition is ordered dismissed.

Dated at Fairbanks, Alaska this 15th day of November, 1955.

/s/ Vernon D. Forbes,
District Judge.

No. 14921

United States
Court of Appeals
for the Ninth Circuit

CONTINENTAL FIRE AND CASUALTY INSURANCE COMPANY, and CLARENCE L. CALD

Appellant,

vs.

J. J. O'LEARY, Deputy Commissioner, Fourteenth Compensation District, Under the Longshoremen's and Harbor Workers' Compensation Act, and EMPLOYERS' MUTUAL CASUALTY CO. OF DES MOINES,

Appellees.

Transcript of Record

Appeal from the United States District Court for the Western District of Washington Northern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—1-20-56

No. 14921

United States
Court of Appeals
for the Ninth Circuit

CONTINENTAL FIRE AND CASUALTY INSURANCE COMPANY,

Appellant,

vs.

J. J. O'LEARY, Deputy Commissioner, Fourteenth Compensation District, Under the Longshoremen's and Harbor Workers' Compensation Act, and EMPLOYERS' MUTUAL CASUALTY CO. OF DES MOINES,

Appellees.

Transcript of Record

Appeal from the United States District Court for the Western District of Washington Northern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Franicsco, Calif.—1-20-56

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Seattle, Washington.

In the District Court of the United States for the Western District of Washington, Northern Division

No. 3880

CLARENCE L. CALDWELL and CONTINENTAL FIRE AND CASUALTY INSURANCE CORPORATION,

Plaintiffs,

vs.

J. J. O'LEARY, Deputy Commissioner, Fourteenth Compensation District, Under the Longshoremen's and Harbor Workers' Compensation Act,

Defendant.

PETITION FOR INJUNCTION

For cause of action against the defendant, plaintiffs allege:

I.

That plaintiff, Clarence L. Caldwell, was, during all times material to this petition, an employee of the Northern Stevedoring and Handling Corporation at Seward, Alaska, where plaintiff Caldwell was employed as a longshoreman. That said Northern Stevedoring and Handling Corporation was engaged in loading and unloading vessels carrying cargo to and from Seward, Alaska.

II.

That the plaintiff, Continental Fire and Casualty Insurance Corp., is now and at all times herein

mentioned was an insurance company organized as a corporation under and by virtue of the laws of the State of Texas and an insurance carrier insuring the Northern Stevedoring and Handling Corporation at Seward, Alaska, covering employees engaged in longshore work, particularly the plaintiff, Clarence L. Caldwell, under the terms of the Act. That said Northern Stevedoring and Handling Corp. was an employer within the provisions of the Longshoremen's and Harbor Workers' Compensation Act, hereinafter referred to as the "Act."

III.

That the defendant, J. J. O'Leary, is now and at all times hereinafter mentioned, was the Deputy Commissioner of the Fourteenth Compensation District under the provisions of this Act.

IV.

That plaintiff Clarence L. Caldwell on May 30, 1951, was employed by the Northern Stevedoring and Handling Corporation at Seward, Alaska, as a longshoreman and that while in the employ of the employer above named he sustained an injury to his back while engaged in unloading lumber aboard the S.S. "Seafair" which was afloat in the waters at Seward, Alaska. That on said date while using a peavy in prying on a timber, the peavy slipped, causing him to fall backwards and to strike his back against a piece of timber which caused severe pain in the spine and resulted in his leaving his work and necessitated his being hospitalized and under medical treatment at Seward, Alaska.

V.

That at the time plaintiff Caldwell was injured on May 30, 1951, the employer, Northern Stevedoring and Handling Corp., was insured by the Employers Mutual Casualty Co. of Des Moines. That following said injury plaintiff's employer did not report the injury to the Deputy Commissioner or the Longshoremen's and Harbor Workers' Commission but instead reported the injury to the Alaska Industrial Board and the Employers Mutual Casualty Co. of Des Moines paid temporary total disability to plaintiff Caldwell under the Alaska Compensation Act from May 30, 1951, to June 5, 1951. That plaintiff Caldwell returned to his work thereafter but continued to have pain in his back and difficulty in lifting and doing his work. That in order to be able to continue working plaintiff Caldwell obtained a back brace and wore the back brace continuously doing his work. That quick movements of his back caused severe pain in the back. That he consulted a Dr. Sellers who treated his back. That if he coughed hard or sneezed he would have severe pain in the back and pain in his legs, mostly in the left leg. That this condition in his spine existed since the accident on May 30, 1951, and he continued to wear his back brace down to October 10, 1953, and at that time had a permanent disability in his back from the accident of May 30, 1951.

VI.

That plaintiff Caldwell on October 10, 1953, was again in the employ of the Northern Stevedoring

and occupation of the employee; (3) the cause and nature of the injury or death; (4) the year, month, day and hour when and the particular locality where the injury or death occurred; and (5) such other information as the Secretary may require. A copy of such report shall be sent at the same time to the deputy commissioner in the compensation district in which the injury occurred."

(f) "Where the employer or the carrier has been given notice, or the employer (or his agent in charge of the business in the place where the injury occurred) or the carrier has knowledge of any injury or death of an employee and fails, neglects, or refuses to file report thereof as required by the provisions of subdivision (a) of this section, the limitations in subdivision (a) of section 913 of this chapter shall not begin to run against the claim of the injured employee or his dependents entitled to compensation, or in favor of either the employer or the carrier, until such report shall have been furnished as required by the provisions of subdivision (a) of this section."

X.

That the employer, Northern Stevedoring and Handling Corporation, at no time up to January 25, 1954, had made a report of plaintiff's injury of May 30, 1951, to the office of the Deputy Commissioner, therefore the Statute of Limitations had not run against the plaintiff Caldwell's claim for the injury which he received on May 30, 1951.

XI.

That under the Longshoremen's and Harbor Workers' Compensation Act it became the duty of the Deputy Commissioner to investigate the plaintiff Caldwell's claim filed on November 13, 1954, with respect to the injury that he received to his back and spine and to adjudicate said claim and determine his time loss and the extent of his permanent disability resulting from his injury of May 30, 1951.

XII.

That the Deputy Commissioner at no time following the filing of the report of injury on January 25, 1954, by said employer has adjudicated or attempted to adjudicate the plaintiff Caldwell's claim for the injury he sustained on May 30, 1951, and no determination was made by the Deputy Commissioner as to the time loss which he was entitled to for said injury, nor the extent of the disability that he had in his back and spine following said injury of May 30, 1951, down to and including October 10, 1953, in spite of the fact that the evidence produced by the plaintiff Caldwell indicated that he did have a definite disability of the spine following the injury of May 30, 1951, which required him to wear a back brace for his back to relieve him of the pain and suffering that he was enduring and to permit him to carry on his work, and the further fact that the attending physician, Dr. Ira McLemore had reported that it was his opinion that the plaintiff Caldwell did have a definite disability in the spine as the result of the in-

jury of May 30, 1951, at the time he sustained a further injury on October 10, 1953, when making a lift of a crate weighing four or five hundred pounds in company with other employees.

XIII.

That on about February 16, 1954, representatives of the Employers Mutual Casualty Company of Des Moines and representatives of the Continental Fire and Casualty Insurance Corp. met with the Deputy Commissioner at Seattle, Washington, at which time the plaintiff Caldwell was present and following said conference a dispute arose between the representatives of the Employers Mutual Casualty Company of Des Moines and the Continental Fire and Casualty Insurance Corp. as to who was responsible for the payment of the medical care and compensation to plaintiff Caldwell as the result of his injury which occurred on May 30, 1951, and the injury which he sustained on October 10, 1953, and as a result of this dispute a hearing before the Deputy Commissioner was requested by the parties.

XIV.

That on the 10th day of September, 1954, a hearing on said claim was held pursuant to the provisions of said Act before defendant J. J. O'Leary, Deputy Commissioner, which hearing resulted in a Compensation Order and Award of Compensation being filed by J. J. O'Leary, Deputy Commissioner, in his office on January 19, 1955, copy of which is attached hereto and marked Exhibit "A," and by

reference made a part hereof as though fully set forth.

XV.

That a certified copy of the transcript of testimony taken at said hearing, together with all exhibits filed and received in evidence in connection therewith will be filed in this cause under the certificate of said Deputy Commissioner, which said testimony and exhibits are by this reference made a part hereof and incorporated herein as though fully set forth.

XVI.

That it is admitted by the parties hereto that plaintiff Caldwell sustained an injury on May 30, 1951, while employed as a longshoreman on the S.S. "Seafair" at Seward, Alaska, and that on October 10, 1953, he sustained another injury to his back and spine while employed by the same employer while working aboard the S.S. "Seafair" at Seward, Alaska. The question presented is whether it was the duty of the deputy commissioner to adjudicate plaintiff Caldwell's claim of back injury of May 30, 1951, when said claim was filed in his office to determine the plaintiff's time loss as a result of said injury, and also to determine the permanent partial disability which the plaintiff suffered to his spine as a result of said injury, and treatment to which he was entitled as a result of said injury.

It is the plaintiffs position that the deputy commissioner was duty-bound to adjudicate plaintiff's claim of injury of May 30, 1951, and to determine

his time loss, permanent partial disability and treatment he was entitled to receive as a result of said injury, before he adjudicated the claim of injury of October 10, 1953, and made the award referred to herein.

XVII.

That said Compensation Order and Award of Compensation of the Deputy Commissioner being not in accordance with the law should be suspended and set aside.

XVIII.

That less than thirty days have elapsed since the entry and filing of said Compensation Order and Award of Compensation and the plaintiffs have no relief or adequate remedy at law.

Wherefore, Plaintiffs pray for judgment as follows:

1. That a decree be entered herein adjudging said Compensation Order and Award of Compensation dated January 19, 1955, and attached hereto and made a part hereof as Exhibit "A," to be unlawful and contrary to the provisions of said Act, and directing that said Award be suspended and set aside and that the defendant be enjoined from enforcing the same.

2. For such other, further or different relief as to the court may seem equitable and just.

/s/ ROY E. JACKSON,
Attorney for Plaintiffs.

EXHIBIT "A"

(Copy)

U. S. Department of Labor
Bureau of Employees' Compensation
Fourteenth Compensation District
Case No. 943-91

In the Matter of:

The Claim for Compensation Under the Longshoremen's and Harbor Workers' Compensation Act

CLARENCE L. CALDWELL,

Claimant,

vs.

NORTHERN STEVEDORING AND HANDLING CORP.,

Employer,

and

CONTINENTAL FIRE AND CASUALTY INSURANCE CORP.,

Insurance Carrier.

COMPENSATION ORDER
AWARD OF COMPENSATION

Such investigation in respect to the above-entitled claim having been made as is considered necessary, and a hearing having been duly held in conformity with law, the Deputy Commissioner makes the following:

Findings of Fact

That on the 10th day of October, 1953, the claimant above named was in the employ of the employer

above named at Seward, in the Territory of Alaska, in the Fourteenth Compensation District, established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, and that the liability of the employer for compensation under said Act was insured by Continental Fire and Casualty Insurance Corporation; that on said day, the claimant herein, while performing service as a Longshoreman for the employer and engaged in discharging cargo from the S.S. "Seafair," which was afloat at the Army Dock, sustained personal injury resulting in his disability when, while lifting a crate weighing about four or five hundred pounds in company with three other employees he experienced a sudden pain in his lower back and legs; that he was admitted to the Seward General Hospital on October 11, 1953, where he remained until October 31, 1953, when he was transferred to the Providence Hospital in Seattle, Washington, and on November 13, 1953, a sub-total laminectomy and fusion of the lumbosacral area of his spine was performed; that written notice of injury was not given within thirty days, but that the employer had knowledge of the injury and has not been prejudiced by the lack of such written notice; that the employer furnished the claimant with medical treatment, etc., in accordance with the provisions of Section 7(a) of the said Act; that the average annual earnings of the claimant herein at the time of his injury amounted to $5,200.00; that as a result of the injury sustained, the claimant was wholly disabled from October 10, 1953, to September 30,

1954, inclusive, and he is entitled to 50 6/7 weeks' compensation at $35.00 for such temporary total disability; that beginning October 1, 1954, the disability of the claimant became permanent in character, causing a loss of wage-earning capacity equivalent to 30% of his average weekly wage at the time of his injury, and he is entitled to compensation at the rate of $20.00 per week (⅔ of the difference between his average weekly wage of $100.00 at the time of his injury and his reduced wage-earning capacity of $70.00 per week) for such permanent partial disability; that the compensation for temporary total disability amounts to $1,780.00; that the accrued compensation for permanent partial disability from October 1, 1954, to January 13, 1955, inclusive, a period of 15 weeks, amounts to $300.00; that the compensation for temporary total and permanent partial disability to January 13, 1955, amounts to $2,080.00; that the employer and insurance carrier have paid to the claimant the amount of $1,780.00 as compensation.

That on November 13, 1953, the claimant filed a claim for compensation in the office of the undersigned Deputy Commissioner alleging that on May 30, 1951, while in the employ of the employer above named he sustained an injury while engaged in handling lumber aboard the S.S. "Seafair," which was afloat at Seward, Alaska, and that on said date, while using a peavey on a timber, the peavey slipped causing him to fall backwards and to strike his back against a piece of timber, in consequence of

which he is reported to have sustained a strained back; that no report of said injury was filed with the undersigned Deputy Commissioner by the employer until January 25, 1954; that the injury was, however, reported to the Alaska Industrial Board at Juneau, Alaska, and the claimant was paid compensation in the amount of $35.75 for temporary total disability from May 30, 1951, to June 5, 1951; that the medical reports submitted in connection with said injury indicated the claimant suffered a strained back; that subsequent to his return to work on or about June 6, 1951, the claimant was able to work whenever work was available although he had at various times experienced recurrent back pain; that the injury of October 10, 1953, was the precipitating cause of the claimant's subsequent disability rather than the minor injury which he sustained on May 30, 1951, while in the employ of the employer above named.

Upon the foregoing facts, the Deputy Commissioner makes the following:

Award

That the employer, Northern Stevedoring and Handling Corporation, and the insurance carrier, Continental Fire and Casualty Insurance Corporation, shall pay to the claimant compensation as follows: 50 6/7 weeks at $35.00 per week for temporary total disability from October 10, 1953, to September 30, 1954, inclusive, in the amount of $1,780.00 and for permanent partial disability 15 weeks at $20.00 per week from October 1, 1954, to

January 13, 1955, inclusive, in the amount of $300.00 or a total of $2,080.00. The employer and insurance carrier having already paid the amount of $1,780.00, there is due and payable accrued compensation in the amount of $300.00, which the employer and carrier are directed to pay forthwith in one sum and thereafter shall Continue payments of compensation in bi-weekly installments at the rate of $20.00 per week subject to the limitations of the Act or until otherwise ordered.

Given under my hand at Seattle, Washington, this 19th day of January, 1955.

J. J. O'LEARY,

Deputy Commissioner, Fourteenth Compensation District.

Proof of Service

I hereby certify that a copy of the foregoing compensation order was sent by registered mail to the claimant, the employer, and the insurance carrier, at the last known address of each as follows:

Mr. Clarence Caldwell, Seward, Alaska.

Northern Stevedoring & Handling Corp., Seward, Alaska.

Continental Fire & Casualty Insurance Corp., c/o Morrell P. Totten & Company, American Building, Seattle, Wash.

Regular Mail:

Employers Mutual Casualty Company, c/o Pacific Insurance Adjusters, Exchange Building, Seattle, Washington.

Bogle, Bogle & Gates, Attorneys-at-Law, Central Building, Seattle, Washington.

Mr. Roy E. Jackson, Attorney-at-Law, American Building, Seattle, Wash.

Bureau of Employees' Compensation, Washington 25, D. C.

J. J. O'LEARY,
Deputy Commissioner.

Mailed: January 19, 1955.
JJO:am.

ph

[Endorsed]: Filed February 11, 1955.

[Title of District Court and Cause.]

PRAECIPE

To the Clerk of the Above-Entitled Court:

You will please file the Petition for Injunction and serve:

Copies on Mr. J. J. O'Leary.
1 copy on Bogle, Bogle & Gates.
1 copy on U. S. Attorney.
2 copies on Attorney General.

ROY E. JACKSON.

[Endorsed]: Filed February 11, 1955.

[Title of District Court and Cause.]

SUMMONS

To the above-named Defendant:

You are hereby summoned and required to serve upon Roy E. Jackson, plaintiff's attorney, whose address, 1207 American Bldg., Seattle 4, Wash., an answer to the complaint which is herewith served upon you, within 60 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Date: February 11, 1955.

MILLARD P. THOMAS,
Clerk of Court.

/s/ J. THORNBURGH,
Deputy Clerk.

Note.—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

Return on Service of Writ

I hereby certify and return, that on the 11th day of February, 1955, I received this summons and served it together with Petition for Injunction herein as follows:

Served J. J. O'Leary, Deputy Commissioner, Fourteenth Compensation District, under the Longshoremen's and Harbor Workers' Compensation

Act by handing to and leaving a true and correct copy thereof with him personally at 905 2nd Ave., Seattle, Wash., on February 15, 1955, at 2:25 p.m., and by handing to and leaving a true and correct copy thereof with Edward J. McCormick, Jr., Assistant United States Attorney for the Western District of Washington at Seattle, Washington, on February 14, 1955, and by mailing by registered mail two true and correct copies thereof to the Attorney General of the United States at Washington, D. C., on February 15, 1955.

W. B. PARSONS,
United States Marshal.

By /s/ JAMES M. CLARK,
Deputy United States
Marshal.

[Endorsed]: Filed February 17, 1955.

[Title of District Court and Cause.]

MOTION TO DISMISS AND MEMORANDUM IN SUPPORT THEREOF

Comes now the defendant J. J. O'Leary, through his attorney, and moves the above-entitled Court for an order dismissing the petition filed herein on the grounds that it fails to state a claim upon which relief can be granted, as appears more clearly from the exhibits attached hereto, being the Official Report of Proceedings in this matter before J. J. O'Leary on September 10, 1954, and December 10,

1954, in two volumes, together with the exhibits entered in those proceedings, being marked: Exhibit #1, Employers Mutual Casualty Co. of Des Moines; and Exhibits 1 to 6, Continental Fire & Casualty Co., together with the Compensation Order of J. J. O'Leary dated January 19, 1955, which is set out subsequently in full; and the memorandum incorporated herein.

Procedural Statement and Compensation Order

The complaint seeks to have the court review and set aside as not in accordance with law a compensation order filed by the Deputy Commissioner on January 19, 1955, pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, 44 Stat. 1424, 33 U.S.C., Sec. 901, et seq. In said compensation order, the Deputy Commissioner awarded compensation to the plaintiff employee on account of a back injury sustained on October 10, 1953, while the plaintiff insurance company was the compensation carrier; the Deputy Commissioner specifically found that "the injury of October 10, 1953, was the precipitating cause of the claimant's subsequent disability rather than the minor injury which he sustained on May 30, 1951, while in the employ of the employer above named," at which time a different insurance company was the compensation carrier.

The Compensation Order

In the compensation order complained of, the Deputy Commissioner found the facts to be in part as follows:

That on the 10th day of October, 1953, the claimant above named was in the employ of the employer above named at Seward, in the Territory of Alaska, in the Fourteenth Compensation District, established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, and that the liability of the employer for compensation under said Act was insured by Continental Fire and Casualty Insurance Corporation; that on said day, the claimant herein, while performing service as a Longshoreman for the employer and engaged in discharging cargo from the SS Seafair, which was afloat at the Army Dock, sustained personal injury resulting in his disability when, while lifting a crate weighing about four of five hundred pounds in company with three other employees he experienced a sudden pain in his lower back and legs; that he was admitted to the Seward General Hospital on October 11, 1953, where he remained until October 31, 1953, when he was transferred to the Providence Hospital in Seattle, Washington, and on November 13, 1953, a sub-total laminectomy and fusion of the lumbosacral area of his spine was performed; * * * that as a result of the injury sustained, the claimant was wholly disabled from October 10, 1953, to September 30, 1954, inclusive, and he is entitled to 50-6/7 weeks' compensation at $35.00 for such temporary total disability; that beginning October 1, 1954, the disability of the claimant became permanent in character causing a loss of wage-earning capacity equivalent to 30% of his average weekly wage at the time of his injury, and he is entitled to com-

pensation at the rate of $20.00 per week (⅔ of the difference between his average weekly wage of $100.00 at the time of his injury and his reduced wage-earning capacity of $70.00 per week) for such permanent partial disability; * * *

That on November 13, 1953, the claimant filed a claim for compensation in the office of the undersigned Deputy Commissioner alleging that on May 30, 1951, while in the employ of the employer above named he sustained an injury while engaged in handling lumber aboard the SS "Seafair" which was afloat at Seward, Alaska, and that on said date, while using a peavey on a timber, the peavey slipped causing him to fall backwards and to strike his back against a piece of timber, in consequence of which he is reported to have sustained a strained back; that no report of said injury was filed with the undersigned Deputy Commissioner by the employer until January 25, 1954; that the injury was, however, reported to the Alaska Industrial Board at Juneau, Alaska, and the claimant was paid compensation in the amount of $35.75 for temporary total disability from May 30, 1951, to June 5, 1951; that the medical reports submitted in connection with said injury indicated the claimant suffered a strained back; that subsequent to his return to work on or about June 6, 1951, the claimant was able to work whenever work was available although he had at various times experienced recurrent back pain; that the injury of October 10, 1953, was the precipitating cause of the claimant's subsequent disability

rather than the minor injury which he sustained on May 30, 1951, while in the employ of the employer above named.

Questions Presented

In paragraph XVI of the complaint it is alleged:

That it is admitted by the parties hereto that plaintiff Caldwell sustained an injury on May 30, 1951, while employed as a longshoreman on the SS "Seafair" at Seward, Alaska, and that on October 10, 1953, he sustained another injury to his back and spine while employed by the same employer while working aboard the SS "Seafair" at Seward, Alaska. The question presented is whether it was the duty of the deputy commissioner to adjudicate plaintiff Caldwell's claim of back injury of May 30, 1951, when said claim was filed in his office to determine the plaintiff's time loss as a result of said injury, and also to determine the permanent partial disability which the plaintiff suffered to his spine as a result of said injury, and treatment to which he was entitled as a result of said injury.

It is the plaintiff's position that the deputy commissioner was duty-bound to adjudicate plaintiff's claim of injury of May 30, 1951, and to determine his time loss, permanent partial disability and treatment he was entitled to receive as a result of said injury, before he adjudicated the claim of injury of October 10, 1953, and made the award referred to herein.

In the same paragraph plaintiffs allege that the Deputy Commissioner was bound to adjudicate the

plaintiff's claim of injury of May 30, 1951, before he adjudicated the claim of injury of October 10, 1953.

The Evidence

Plaintiffs in their complaint do not challenge the findings of fact made by the Deputy Commissioner in his compensation order. The resumé of the evidence given below is for the purpose, not of showing that the findings as to the two injuries are supported by evidence, but merely for the purpose of familiarizing the court with the evidence in the case.

At the hearing before the Deputy Commissioner on September 10, 1954,

Clarence L. Caldwell, the plaintiff, testified in part as follows: That on May 30, 1951, he was injured when a peavey slipped as he was trying to pry apart two bundles and he went over backwards striking his back on a bundle of lumber or plywood or plasterboard (Tr. 10); that following his fall on May 30, 1951, he worked the rest of that shift, and on the next day (he believed it was) he went to see Dr. Shelton who put him in Seward General Hospital (Tr. pp. 10 to 11); that he was in the hospital five days and upon his return to work he had backache and pains when he got into certain positions (Tr. 12); that he did not continue under the care of Dr. Shelton (Tr. 12 to 13); that there were days the "job was too hard" for him and he would go home (Tr. 13); that after seeing a Dr. Sellers who told him it was his sacroiliac

that was giving him trouble he got a back brace (in February or March of 1952) (Tr. 14); that on October 10, 1953, he helped to lift a crate that probably had a little more weight than he had lifted at other times and he "seemed to lose control of everything below the hips"; that the crate contained a deep freezer which weighed four or five hundred pounds (Tr. 15); that he went home right away, went to bed and the next morning went to the hospital where he consulted Dr. Deisher; that he remained under Dr. Deisher's care until he came to Seattle on November 2, 1953, where he was treated by Dr. McLemore and an operation on his back was performed on November 13th (Tr. 16); that he is still under Dr. McLemore's care who had not released him for work (Tr. 16 to 17); that he considered the injury of May 30, 1951, "more or less of a twist or sprain" and that is how he and the doctor treated it; that after such sprain he continued to work for seven hours on the shift (Tr. 19); that after such sprain he did not consult Dr. Shelton for two days [claimant having previously testified he believed he consulted Dr. Shelton the next day]; that he went to Dr. Shelton's office on that occasion and Dr. Shelton told him he had a slight sprain of the muscles of the back (Tr. 20); that he left the hospital on June 6, 1951, at which time Dr. Shelton advised him he could return to work; that stevedoring work in Seward is not daily work but depends upon how many boats are in (Tr. 21); that some months stevedores work only two or three days (Tr. 22); that the first physician he consulted after he had

consulted Dr. Shelton was Dr. Sellers, a period of eight or nine months later although he was experiencing almost constant daily pain (Tr. 26); that in lifting the crate onto the deck of the ship he turned away from it so as to give him "more room to step over" and experienced a sharp pain in the lower part of his back (about at the belt line) and in his legs (Tr. 33 to 34); that the pain was "in the small of" his back and was shooting down his hips and legs (Tr. 34); that the pain was severe and more than he had been having because he had lifted too much weight; that the injury of October 10, 1953, occurred about 4:00 o'clock and he went home about 4:30 after waiting for the dispatcher to arrive and without finishing the shift (Tr. 35); that he went to the hospital the next morning where he remained about three weeks and where he was placed in a body cast before being sent to Seattle (Tr. 36); that x-rays were taken at the Seward hospital and he was in a body cast when he arrived in Seattle (Tr. 37); that Dr. Sellers gave him treatment for his sacroiliac, snapping his back "more or less like a chiropractor would" (Tr. 45); that such treatments (about three in number) seemed at times to ease his back condition temporarily (Tr. 45 to 46); that Dr. Sellers also prescribed heat treatments and hot baths (Tr. 46); that, other than recommending the use of a back brace and a heat pad, Dr. Sellers prescribed no other treatment (Tr. 52).

Dr. Ira O. McLemore, a witness called by the plaintiff carrier, testified in effect that he examined the claimant at Providence Hospital, Seattle, on No-

vember 2, 1953, x-rays were taken which disclosed evidence of partial lumbarization of the first sacral segment and a spinal (pantopaque) study was made on November 5th (Tr. 60, 63, 64); that a filling defect between the fifth and sixth lumbar vertebra was noted which he felt was due to a rupture of the nucleus pulposus, and he recommended a subtotal laminectomy, removal of the nucleus, and a fusion of this area, due to the fact there was the pre-existing malformation, which operation was performed on November 11th; that certain definite adhesions appeared about the nerve roots with evidence of the previous malformation as noted in the x-rays (Tr. 64); that he thinks the claimant's injury of May 30, 1951, had a bearing on claimant's condition on November 2, 1953, because the history given by the claimant indicates he had not completely recovered from its effects and claimant had additional injuries superimposed on the condition (in the accident of October 10, 1953) (Tr. 67 to 68); that claimant had two conditions—a ruptured necleus with adhesions about the nerve roots, and the malformation of the spine the cause of which is an inherent weakness of the area with which back and leg pains are frequently associated (Tr. 68 to 69); that, while he thinks the adhesions existed for "some period of time," they cannot tell at surgery when they did occur (Tr. 69); that he thinks claimant's pain down his leg, following the May 30, 1951, strain, was due to the adhesions (Tr. 69 to 70); that he thinks the adhesions would be associated with the accident of May 30, 1951, (Tr. 70); that he does not know of his own knowledge of

the extent of injury from the May 30, 1951, injury (Tr. 72); that following claimant's second injury of October 10, 1953, claimant was in a condition of total disability; that when he first examined claimant he suspected there might be present a herniated disc (Tr. 73); that although atrophy is sometimes present in such cases, he has no notation of finding atrophy in claimant's left leg (Tr. 74); that he found no reflex changes, which changes are present sometimes in such cases; that claimant had a marked, chronic weakness of the spine because of the malformation with which claimant was born (Tr. 75); that such a malformation usually tends to make an unstable back; that he did not determine from the appearance of the adhesions how old they were (Tr. 76); that a congenitally-weak spine probably tends to develop adhesions more than the average, and adhesions sometimes result from infection; that the possibility exists that claimant's adhesions were due to either infection, congenital weakness, or injury (Tr. 77); that, from the history given by claimant, he thinks the adhesions occurred at the time of the injury two years previously, but he could not tell their cause from looking at the spine; that it appears claimant's preexisting condition had been aggravated by the second injury of October 10, 1953 (Tr. 78).

At the hearing before the Deputy Commissioner on December 10, 1954,

Dr. Bernard E. McConville, a witness called by the Employers Mutual Casualty Company of Des the back. The physician's report attached to the

Moines, testified in part as follows: that he has specialized in orthopedic surgery since 1937 (Tr. 89 to 90); that he reviewed the report of Dr. McLemore (Tr. 90); that claimant's sixth lumbar vertebra is a congenital malformation and any such malformation tends to weaken, mechanically, the structure of the spine and make it prone to injury (Tr. 92 to 93); that such congenital defect developed since the claimant was born through the formative years; that the deformity of claimant's facets, which may be likened to a pair of door hinges, is also a part of the congenital malformation or weakness of the joint (Tr. 93); that since birth claimant had a weak lumbosacral joint which causes intermittent periods of back discomfort and made him more prone to injury (Tr. 94 to 95); that adhesions are scar tissue formations that develop secondarily to an inflammatory process (Tr. 95); that claimant may have had "minor disability" from the strain of May 30, 1951, but because of his complete collapse following the injury of October 10, 1953, it is his opinion the second injury was the producing factor of claimant's present disability; that he does not believe that claimant's adhesions, diagnosed post-operatively as adhesive arachnoiditis, would have existed since claimant's first injury without disabling him before his complete collapse immediately following the injury of October 10, 1953, (Tr. 98); that such condition developed as a result of a definite episode [the second injury], the impingement of the nerves going down claimant's left leg apparently being the cause of his immediate work stoppage; that he feels such condition was

due to the second injury because the claimant had been able to work for over two years following the back strain of May 30, 1951, (Tr. 98 to 99); that he does not think such adhesions could have existed since the first injury since claimant would have had more of a reaction if they had so existed; that an inflammatory process such as adhesions has a relatively short period in which it develops and has either to burn suddenly or burn out (Tr. 99); that claimant is more prone to have back pain even from posture [such as the pain following the back strain of May 30, 1951, as to which claimant testified] (Tr. 100); that, while claimant could have had disability from the first injury, claimant may, over the years, have gradually developed a weakness of his back necessitating a back brace, but claimant "very distinctly had a severe second injury" (Tr. 104-105); that the fact that claimant, on examination by Dr. McLemore, had definite muscle spasm after being in a cast (following the second injury) would indicate that claimant "had something severe" [resulting from the second injury] that has happened over and above [claimant's condition following the first injury], because if he had had a severe degree of muscle spasm any place* * * he wouldn't be able to work [following the first injury] (Tr. 109 to 110); that he does not think claimant's adhesions could have existed since the injury of May 30, 1951, but thinks they would have occurred within a few weeks of the time Dr. McLemore operated on the claimant (Tr. 113); that most of the pain in claimant's congenitally deformed back

would be muscular pain, which is the reason claimant got relief from wearing a belt or back brace or from sleeping on a hard bed, thereby allowing the muscles to relax (Tr. 115); that the nerve pain in claimant's leg could have been caused by increased muscle tightness in the area of weakness in claimant's back (Tr. 115 to 116); that persons with sacroiliac slip get a kink in their back and neuralgia down the leg but it is not a definite pinching of the nerve root so as to give a definite, permanent pattern of pain (Tr. 117).

There was received in evidence as Exhibit No. 1 of the Employers Mutual Casualty Company of Des Moines, the deposition of Dr. J. H. Shelton taken on September 7, 1954, at Anchorage, Alaska. This deposition shows in effect that Dr. Shelton saw the claimant at the hospital following his injury of May 30, in 1951, and diagnosed claimant's condition as sprained muscles of the back. No X-rays were indicated and none were taken. The claimant was put back to work in about a week and Dr. Shelton saw him no further, after having prescribed heat and rest. No type of back brace or support was prescribed by Dr. Shelton, and he had no reason for thinking the claimant suffered any permanent damage to his back. According to Dr. Shelton's recollection, claimant was not hospitalized but was treated as an outpatient in Dr. Shelton's office in the hospital, but Dr. Shelton would not dispute claimant's testimony that he was hospitalized. Claimant's only symptoms were painful muscles of

report and made a part thereof by stipulation shows that the injury on May 30, 1951, as "sprained muscles of the back," that claimant was admitted to the hospital on June 3d and discharged on June 6th, 1951; that no further treatment was needed and that patient would be able to resume his regular work on June 8, 1951.

There were also received in evidence as Exhibits Nos. 1 to 6 of the plaintiff carrier depositions of claimant's co-workers on their observation of claimant at work; they do not show much beyond the fact that claimant had two injuries and that claimant generally worked his regular shifts after the first injury.

In Paragraph XVI of the Complaint, the plaintiff-carrier admits that the employee Caldwell sustained an injury on October 10, 1953, while employed by Northern Stevedoring and Handling Corporation. As mentioned above, the plaintiff-carrier does not allege that the findings of fact of the deputy commissioner in relation to the fact of injury and the fact of physical disability, as well as the fact of loss of wage earning capacity, are not supported by the evidence. In the absence of any allegation with respect to these factors, the complaint must be taken as raising no question whatsoever concerning the correctness of findings of fact heretofore made.

The question naturally arises: What is it then that the plaintiff-carrier seeks to show by way of

error on the part of the deputy commissioner? In the same Paragraph XVI plaintiff-carrier asserts that the question is whether it was the duty of the deputy commissioner to adjudicate the employee's claim arising from an injury on May 30, 1951, and to determine the alleged permanent partial disability which the plaintiff suffered to his spine as the result of said injury, as well as the treatment to which he was entitled on account thereof.

It will be seen therefore that the allegation of complaint is not directed to any error referable to the compensation order before the Court. Accordingly, the complaint should be dismissed for the very obvious reason that under section 21(b) of the Compensation Act (33 U.S.C. 921(b)) the only matter which properly can be raised is a matter in relation to the contents of the compensation order supported by proof in respect thereto, that the compensation order is "not in accordance with law." The compensation order in the present case could be examined indefinitely without it ever disclosing on its face any apparent error. Moreover, should the compensation order be read in the light of the evidence contained in the transcript of testimony there is nothing in that evidence which makes any finding inappropriate. It is well settled law that the court on judicial review will not search a record to find support for an omnibus assertion of error or to supply a justiciable issue which the plaintiff does not supply. "We are not compelled to search the record for undesignated error claimed

upon an omnibus assertion." North Whittier Heights Citrus v. National Labor Relations Board, 109 F. 2d 76 (C.A. 9, 1940), certiorari denied 310 U.S. 632. A petitioner is required to point out with particularity which of the findings of fact in the administrative order complained of are not supported by evidence, a general allegation being insufficient, and the court will grant a motion attacking the complaint for insufficiency. Royal Baking Powder Company v. Federal Trade Commission, 1 Stats. and Decs. Fed. Trade Com. 715 (C.A. 2, 1921); John C. Winston Company v. F.T.C., same 716 (C.A. 3, 1924); Oppenheim, etc., v. F.T.C., same 717 (C.A. 4, 1924); these cases are cited in Pike & Fischer Administrative Law, Vol. 1 (Background Digest, Key 63g.311). A petitioner is required to state wherein an order is erroneous. Moir v. F.T.C. same 718 (C.A. 1, 1925); Stuart v. Federal Communications Commission, 105 F. 2d 788 (App. D.C. 1939); mere conclusions of law in a petition for review of a compensation order are not sufficient. Perry v. U. S. Employees' Compensation Commission, et al., 27 F. 2d 144 (Cal. 1928), a Longshoremen's Act case. Accord: Hainey v. Tunnel Coal Co., 93 Conn. 90, 105 A. 333 (1918); Greenwood v. Luby, 105 Conn. 398, 135 A. 578 (1926); Russitte v. Otis Steel Co., 12 Ohio App. 189 (1919).

Assuming that the relief sought by the plaintiff-carrier were granted (namely, that this Court should require the deputy commissioner to determine and adjudicate the employee's claim in respect

to his back injury of May 30, 1951), notwithstanding such action that adjudication would not in any event have any bearing upon the correctness of the compensation order before the Court. It is obvious from the complaint that the plaintiff-carrier has misconstrued the underlying fundamental basis for the payment of compensation under the Longshoremen's Act. Compensation is paid under that Act in cases of injury such as the present one, not on the basis of any loosely construed notion of "disability" in a physical sense, but on a very definite and specific basis founded upon the loss of employee's wage-earning capacity due to injury.

Plaintiff-carrier seems to be of the view that determination of compensation under the Act is made on the basis of physical loss or physical impairment, the plaintiff's implied assumption being that an able-bodied man is 100 per cent physically capable, but that an injury in the compensation sense diminishes from the 100 per cent the physical capabilities of the injured man and compensation is to be paid for this lack of physical vigor. This is not the case, and since it is not the case, the plaintiff's interest in the effects of the injury of May 30, 1951, is irrelevant.

In determining compensation under the Longshoremen's Act (except for scheduled losses not here involved), the two factors which control the amount of compensation to be paid are: (1) the wages at time of injury and (2) the wages of the

employee thereafter, if he has capacity to earn wages. If he has no capacity to earn wages after injury, the disability is necessarily total. It is a well-known fact that many employees who have prior physical anomalies, disabilities and conditions work and have varying capabilities of earning their livelihood.

When an employee is injured, the Act requires the deputy commissioner to ascertain the average weekly wages at the time of that injury. If the employee returns to work the capacity of the employee to earn after the injury is examined to see whether the accident diminished that capacity. If so, the employee receives compensation for such capacity as the injury has destroyed. That is precisely what the deputy commissioner did in the present case. He determined the wages at the time of the injury and he then determined that the employee was incapable because of the injury of returning to work and therefore had, for the time being, total loss of earning capacity. The only proper question which the plaintiff-carrier could have presented in the present case (but which it did not present) is whether the 1953 injury currently produced diminution of wage earning capacity according to the present evidence. The findings on this point not having been challenged, they of course are final and binding on this plaintiff It is the duty of a plaintiff to show wherein findings of fact are not supported by the evidence and there is a presumption that the findings of fact of the

deputy commissioner are correct: Anderson v. Hoage, 63 App. D.C. 169, 70 F. 2d 773 (1934); Luckenbach Steamship Co., Inc., v. Norton, 96 F. 2d 764 (C.A. 3, 1938); Burley Welding Works, Inc., v. Lawson, 141 F. 2d 964 (C.A. 5, 1944).

The plaintiff-carrier did not contest before the deputy commissioner the fact that the employee before injury in fact (a) performed work for the employer (Northern Stevedoring) and (b) that he received a certain wage for that work. Nor did the plaintiff-carrier contest the amount of the then wage as not truly representing the then wage-earning capacity of the employee. If the 1953 injury was the cause of the employee ceasing to perform the work he had done immediately prior thereto, then of course it was the 1953 injury which was responsible for the subsequent wage loss. After the 1953 injury, it could not have been the 1951 injury which caused the loss, because (in the absence of a challenge) the claimed rate of wages asserted by the employee as his earned wage at the time of the 1953 injury, would necessarily have to be accepted by the deputy commissioner as wages then earned in exercise of wage-earning capacity. The wages obviously were not given to the employee as an unearned gift. In the absence of such a challenge, supported by proof that the employee was not worth what he was being paid at the time of the second injury, the deputy commissioner could not do other than accept as a fact the earning capacity of the employee as shown by the amount of the

wage which was then paid to him by his employer. What the employee actually lost by reason of his 1953 injury was his 1953 wage-earning capacity, a capacity established by work and earnings, which was not denied by plaintiff.

It will be noted from the foregoing that the deputy commissioner's determination of the facts (1) that the employee worked in 1953, (2) that he was paid a certain wage in 1953 prior to the injury of 1953, and (3) that subsequent to the October 10, 1953, injury he was unable to continue to earn that wage because that injury causing him to have total loss of wage-earning capacity, necessarily required the kind of findings that the deputy commissioner made, and which of course are not complained of. If the deputy commissioner had determined anything whatsoever with respect to the 1951 injury, that determination would not in the least have altered any of the indisputable facts just mentioned, and could not have affected the amount of compensation those facts, arising from and in connection with the 1953 injury, would have supported. Accordingly, while we deny that the plaintiff-carrier has any right to have an injury claim decided with respect to which it could not possibly have been an interested party, we go further and assert that the adjudication of that claim would have no bearing on the merits of or the result reached in respect to the claim filed, on account of the 1953 injury. This is because com-

pensation is paid for wage loss and not for physical damage as such.

As above stated, it is obvious from the plaintiff-carrier's statements that plaintiff-carrier in some fashion has arrived at the conclusion that "disability" for which compensation was awarded in this case compensates the employee on the basis of physical impairment. The carrier's second implied premise is that this being so, it is possible to split the physical impairment which the employee has suffered into two parts, charging one part to the 1951 injury and the other part to the 1953 injury. Even a casual reading of the Longshoremen's Act will show that this premise is utterly without statutory foundation. The compensation is of course paid on the basis of loss of wage-earning capacity and not for loss of physical capacity. Any diminution of an employee's earning capacity, whether due to a prior childhood or other injury or to physical anomalies or to prior occupational or non-occupational causes of whatever nature, if these physical conditions do in fact hinder ability to earn, in the nature of things they are necessarily expected to show up in the employee's wages. Accordingly, if the physical conditions are really effective hindrances to earning a living, the wage-earning capacity of the employee is pro tanto diminished. The Act contemplates that the effects of conditions of this sort (and we include here any physical impediment to working effectively that might have resulted from the employee's 1951 injury) would

be expected to be reflected in diminished capacity to earn. If in the present case the 1951 injury did have any such effect in 1953, it may properly be inferred that diminished capacity showed up in the earnings which the employee had just prior to his injury of October 10, 1953, whether or not looked for by anyone. The earnings on that date represented his wage-earning capacity whether or not diminished, since the plaintiff-carrier did not contend or show otherwise or establish that the employee was favored by his employer and was not in fact earning his pay. This being so, it is obviously unimportant what the deputy commissioner would have found with respect to the 1951 injury, because any findings made could not have changed the fact that in October, 1953, the employee admittedly earned a certain quantum of wages and that he did not continue to earn that quantum because of the 1953 injury—he being totally incapacitated on account of the 1953 injury.

The law is well settled that if a new injury adds to or aggravates an underlying pathological weakness or condition to the point that it produces further loss of wage-earning capacity, the employer in whose employ the disabling injury occurred is liable for all the consequences of that injury whether it produces total or partial disability. Head Drilling Co. v. Industrial Accident Commission, 177 Cal. 194, 170 P. 157 (1918); Prince Chevrolet Company v. Young, 187 Okl. 253, 102 P. 2d 601 (1940); Borstel's case, 307 Mass. 24, 29 N.E. 2d 130 (1941);

Billington v. Great Lakes Dredge and Dock Company, 263 A.D. 1040, 33 N.Y.S. 2d 703 (1942); Grieco v. C. R. Daniels, Inc., 17 N.J. Misc. 393, 9 A. 2d 671 (1940); Taylor v. Federal Mining and Smelting Company, 59 Idaho 183, 81 P. 2d 728 (1938); Hajek v. Brown, 255 A.D. 729, 6 N.Y.S. 2d 821 (1939); Maloney v. Utility Roofing Co., 45 N.Y.S. 2d 746 (1944), affirmed 293 N.Y. 915, 60 N.E. 2d 127; Sutton v. Courtney, 203 Okl. 590, 224 P. 2d 605 (1950).

In the Head Drilling Co. case, supra, the court said:

> We are of the opinion that a subsequent incident or accident aggravating the original injury may be of such a nature and occur under such circumstances as to make such aggravation the proximate and natural result of the original injury. Whether the subsequent incident or accident is such or should be regarded as an independent intervening cause is a question of fact for the Commission, to be decided in view of all the circumstances and its conclusion must be sustained by the courts whenever there is a reasonable theory evidenced by the record on which the conclusion can be upheld.

In the Prince Chevrolet Company case, supra, the court said:

> As to whether the disability resulted from a prior injury or is an aggravation of a prior injury or is caused by a new and independent

injury, is a question of fact solely within the province of, and for the determination of, the State Industrial Commission and if there be any competent evidence to sustain the finding, an award based thereon will not be disturbed. (Citing cases.)

In Maloney v. Utility Roofing Co., supra, which also involved two back injuries, the court said that even though the employee at the time of the second injury had not fully recovered from the first injury, the evidence authorized compensation for the second injury alone. Accord: Pittsburgh Plate Glass Co. v. Wade, 197 Okl. 681, 174 P. 2d 378 (1946).

Under the Longshoremen's and Harbor Workers' Compensation Act there is no such thing as apportioning compensation between two or more injuries since there is no method in the Act for computing compensation on such basis. Any attempt to do so would violate the fundamental purpose of the Act to compensate for wage-loss attributable to each injury. An employer takes an employee as he finds him; this is so held in the 9th Circuit under the Longshoremen's Act in Pac. Empl. Ins. Co. v. Pillsbury, 61 F. 2d 101. See also Great Atl. and Pac. Tea Co. v. Cardillo, 127 F. 2d 334; Trudenich v. Marshall, 34 F. Supp. 486; Wood Preserving Corp. v. McManigal, 39 F. Supp. 177.

Conclusion

In view of the above, it would appear that the compensation order complained of is in accordance

with law and that the complaint should be dismissed.

/s/ CHARLES P. MORIARTY,
United States Attorney.

/s/ F. N. CUSHMAN,
Assistant U. S. Attorney.

Receipt of copy acknowledged.

[Endorsed]: Filed April 20, 1955.

[Title of District Court and Cause.]

ORDER OF INTERVENTION

This matter coming on to be heard upon the motion of Employers Mutual Casualty Company of Des Moines, Iowa, to intervene in the above matter; and the court being fully advised in the premises

It is hereby Ordered that Employers Mutual Casualty Company of Des Moines, Iowa, a corporation, be permitted to intervene in the above-entitled proceeding.

Done in Open Court this 6th day of June, 1955.

/s/ JOHN C. BOWEN,
United States District Judge.

Presented by:

/s/ EDW. S. FRANKLIN,
Attorney for Defendant, Employers, Mutual Casualty Company.

Approved and Notice of Presentation Waived:

/s/ ROY E. JACKSON,
Attorney for Plaintiff.

/s/ F. N. CUSHMAN,
Attorney for Defendant, Asst. United States District Attorney.

[Endorsed]: Filed June 6, 1955.

Roy E. Jackson
Attorney at Law
1207 American Building
Seattle 4, Wash.
Eliot 2300

August 8, 1955.

Air Mail

Mr. Clarence L. Caldwell,
P. O. Box 84,
Seward, Alaska.

Re: Clarence L. Caldwell, Claimant,
Continental Fire and Casualty Ins. Corp.,
v. J. J. O'Leary, Deputy Commissioner,
District Court, No. 3880.

Dear Mr. Caldwell:

We have filed in the United States District Court on behalf of yourself and Continental Fire and Casualty Insurance Corporation, a Petition for Injunction against J. J. O'Leary, Deputy Commissioner, Longshoremen's and Harbor Workers' Compensation Commission, and Employers' Mutual

Casualty Co. of Des Moines. The attorneys for J. J. O'Leary and Employers' Mutual Casualty Co. of Des Moines have made a motion asking that you be dismissed as a party plaintiff in this case because your interest may be adverse to both the insurance companies and a ruling on behalf of either insurance company might be to your disadvantage. I believe we discussed this matter prior to the time you left Seattle for Alaska, at which time it was decided that a Petition for Injunction would be filed against Mr. O'Leary's decision.

In order to clarify your desire to have me represent you in this case, because of the fact that we do have a dispute between the two insurance companies with respect to who will pay the full bill, I would appreciate having you sign the authorization for me to represent you. This matter is coming up for hearing on Monday, August 15th, so it will be necessary for you to sign this letter of authorization for me to represent you, otherwise we will have your name dismissed as a party plaintiff.

Very truly yours,

/s/ ROY E. JACKSON.

REJ:ph

Dear Mr. Jackson:

Please be advised that it is my desire that you represent me in the above-captioned case now on file in the United States District Court of Washington, Northern Division, No. 3880.

/s/ CLARENCE L. CALDWELL.

[Title of District Court and Cause.]

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter having come on duly and regularly for hearing on August 15, 1955, on the Motion of the defendant and the Motion of the Intervenor for an order dismissing the above-entitled cause, plaintiffs being represented by Roy E. Jackson, their attorney, and defendant being represented by Charles P. Moriarty, United States Attorney, and Ed. J. McCormick, Assistant United States Attorney, and intervenor, Employers' Mutual Casualty Co. of Des Moines, being represented by Edward S. Franklin, of Bogle, Bogle & Gates, and the court having considered the arguments of counsel herein and having considered the records and files herein, enters the following:

Findings of Fact

I.

That plaintiff, Clarence L. Caldwell, was at all times material herein an employee of Northern Stevedoring and Handling Corporation of Seward, Alaska, and acted in the capacity of a longshoreman.

II.

That plaintiff Clarence L. Caldwell suffered an injury compensable under the Longshoremen's and Harbor Workers' Compensation Act on May 30, 1951, while in the employ of the Northern Stevedoring and Handling Corporation by reason of a

peavy slipping, causing him to fall backwards, striking his back against a piece of timber which caused pain in the back and resulted in his leaving work and being hospitalized and under medical treatment at Seward, Alaska. That compensation for this injury was received by plaintiff Caldwell from the Alaska Industrial Board but plaintiff's employer failed to report the injury to the Longshoremen's and Harbor Workers' Commission at the time or immediately following the injury.

III.

That thereafter plaintiff Caldwell filed a claim for compensation in the office of the Deputy Commissioner alleging injury on May 30, 1951, as aforesaid, which claim has not been adjudicated nor has there been any hearing thereon.

IV.

That on or about October 10, 1953, while in the employ of the Northern Stevedoring and Handling Corporation and while working on the S/S "Seafair" plaintiff Caldwell suffered an injury to his back while attempting to lift a crate which was about 4 feet long, 2 feet wide and 3 feet high, which crate weighed about five hundred pounds and as the result of that injury suffered pain in the low back and was sent to Seattle, Washington, for treatment. That the second injury was in the same general area of the first injury and plaintiff Caldwell had been suffering from pain and had worn a back brace between the time of the injury of May 30, 1951, and the injury of October 10, 1953.

V.

That claim was filed for the injury of October 10, 1953, and an award was made thereon finding disability arising out of the injury of October 10, 1953, and determining that no disability arose from the injury of May 30, 1951.

VI.

That the Continental Fire and Casualty Insurance Corp. appealed on the ground that there had been no hearing by the Commissioner on the claim following the first injury and no award made thereon and no determination of disability prior to the determination on the claim arising out of the injury of October 10, 1953.

VII.

That no challenge is made to the findings of the Deputy Commissioner by the plaintiffs herein.

Signed in Open Court this ..... day of August, 1955.

....., Judge.

From the Foregoing Findings of Fact, the Court Now Makes the Following:

Conclusions of Law

I.

That the Deputy Commissioner was not required by law to determine the claim of plaintiff arising out of the injury of May 30, 1951, prior to adjudi-

cating the claim arising out of the injury of October 10, 1953.

II.

That there is some evidence in the record upon which the Deputy Commissioner could base his findings relative to the disability of Clarence L. Caldwell on the injury of October 10, 1953, and the award must therefore be affirmed.

III.

That the Petition for Injunction herein should be dismissed.

Signed in Open Court this ..... day of August, 1955.

....., Judge.

Presented by:

/s/ ROY E. JACKSON,
Attorney for Plaintiff.

[Endorsed]: Filed August 18, 1955.

United States District Court, Western District of Washington, Northern Division

No. 3880

CLARENCE L. CALDWELL and CONTINENTAL FIRE AND CASUALTY INSURANCE CORPORATION,

Plaintiffs,

vs.

J. J. O'LEARY, Deputy Commissioner, Fourteenth Compensation District, Under the Longshoremen's and Harbor Workers' Compensation Act,

Defendant,

and

EMPLOYERS' MUTUAL CASUALTY CO. OF DES MOINES,

Intervenor.

ORDER OF DISMISSAL

This Matter having come on duly and regularly for hearing on August 15, 1955, on the motion of the defendant and the motion of the intervenor for an order dismissing the above-entitled cause, plaintiffs being represented by Roy E. Jackson, Esquire, their attorney, and defendant being represented by Charles P. Moriarty, United States Attorney for the Western District of Washington, and Edward J. McCormick, Jr., Assistant United States Attorney, his attorneys, and intervenor being represented by Edward S. Franklin, Esquire, its attorney, the Court having heard the arguments of counsel and having announced its oral decision that the motion to dismiss should be granted and that the above-

entitled action should be dismissed, now, therefore, it is hereby

Ordered that the motion to dismiss of the defendant and of the intervenor is granted and the above-entitled action be and it hereby is dismissed with prejudice.

Done in Open Court this 18th day of August, 1955.

/s/ JOHN C. BOWEN,
United States District Judge.

Presented and approved by:

/s/ CHARLES P. MORIARTY,
United States Attorney.

/s/ EDWARD J. McCORMICK, JR.,
Assistant U. S. Attorney.

Approved:

/s/ EDWARD S. FRANKLIN,
Attorney for Intervenor.

Approved as to Form:

.....,
Attorney for Plaintiffs.

[Endorsed]: Filed August 18, 1955.

Entered August 19, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: J. J. O'Leary, Deputy Commissioner, Fourteenth Compensation District, under the Long-

shoremen's and Harbor Workers' Compensation Act, and to Charles P. Moriarty and Edward J. McCormick, Jr., United States Attorneys, and to Employers' Mutual Casualty Co. of Des Moines, Intervenor, and Edward S. Franklin and Bogle, Bogle & Gates, its attorneys, and to Millard Thomas, Clerk of the U. S. District Court for the Western District of Washington:

Please Take Notice that the Continental Fire and Casualty Insurance Corporation, plaintiff in the above-entitled action, does hereby give notice of appeal from that certain order of dismissal entered in Cause No. 3880 on the 18th day of August, 1955, by the Honorable John C. Bowen, from that portion of the judgment which recites:

> "That the motion to dismiss should be granted and that the above-entitled action should be dismissed, now, therefore, it is hereby ordered that the motion to dismiss of the defendant and the intervenor is granted and the above-entitled action be and it hereby is dismissed with prejudice."

Said appeal being taken to the United States Court of Appeals for the 9th Circuit.

/s/ ROY E. JACKSON,
Attorney for Plaintiff, Continental Fire and Casualty Insurance Corporation.

[Endorsed]: Filed September 19, 1955.

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Know All Men By These Presents:

That we, Clarence L. Caldwell and Continental Fire and Casualty Insurance Corporation, the Plaintiffs above named, as Principals, and the United Pacific Insurance Company, a corporation organized under the laws of the State of Washington, and authorized to transact the business of surety in the State of Washington, as surety, are held and firmly bound unto J. J. O'Leary, Deputy Commissioner, 14th Compensation District, under the Longshoremen's and Harbor Workers' Compensation Act, Defendant in the above-entitled cause, in the sum of Two Hundred Fifty and No/100 Dollars ($250.00).

Sealed with our seals and dated this 12th day of September, 1955.

The Condition of This Obligation Is Such, that

Whereas, the District Court of the United States for the Western District of Washington, Northern Division, on the 18th day of August, 1955, in the above-entitled action Order of Dismissal was entered dismissing the action of plaintiffs and

Whereas, the above-named Principals have heretofore given due and proper notice that they appeal from said order to the United States Court of Appeals for the Ninth Circuit;

Now, Therefore, If the said Principals, Clarence L. Caldwell and Continental Fire and Casualty Insurance Corporation, shall pay all costs and damages that may be awarded against them on the appeal, or on the dismissal thereof, not exceeding the sum of Two Hundred Fifty and No/100 Dollars ($250.00), then this obligation to be void; otherwise to remain in full force and effect.

CLARENCE L. CALDWELL.

By /s/ ROY E. JACKSON,
His Attorney.

[Seal] CONTINENTAL FIRE AND CASUALTY INSURANCE CORPORATION.

By /s/ MORRELL P. POLLEN.
UNITED PACIFIC INSURANCE COMPANY.

By /s/ A. L. WING, JR.,
Attorney-in-Fact.

[Endorsed]: Filed September 19, 1955.

[Title of District Court and Cause.]

AMENDED NOTICE OF APPEAL

To: J. J. O'Leary, Deputy Commissioner, Fourteenth Compensation District, under the Longshoremen's and Harbor Workers' Compensation Act, and to Charles P. Moriarty and Edward

J. McCormick, Jr., United States Attorneys, and to Employers' Mutual Casualty Co. of Des Moines, Intervenor, and Edward S. Franklin and Bogle, Bogle & Gates, its Attorneys, and to Millard Thomas, Clerk of the U. S. District Court for the Western District of Washington:

Please Take Notice that the Continental Fire and Casualty Insurance Corporation, and Clarence L. Caldwell, plaintiffs in the above-entitled action, do hereby give notice of amendment to that certain notice of appeal filed in the above court on the 19th day of September, 1955, from that certain order of dismissal entered in Cause No. 3880 on the 18th day of August, 1955, by the Honorable John C. Bowen, from that portion of the judgment which recites:

> "That the motion to dismiss should be granted and that the above-entitled action should be dismissed, now, therefore, it is hereby ordered that the motion to dismiss of the defendant and the intervenor is granted and the above-entitled action be and it hereby is dismissed with prejudice."

Said appeal being taken to the United States Court of Appeals for the 9th Circuit.

/s/ ROY E. JACKSON,
Attorney for Plaintiffs.

[Endorsed]: Filed September 30, 1955.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO RECORD ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 10 of the United States Court of Appeals for the Ninth Circuit and Rule 75(O) of the Federal Rules of Civil Procedure and designation of counsel, I am transmitting herewith the following original papers in the file dealing with the action, as the record on appeal from the Order of Dismissal filed Aug. 18, 1955, to the United States Court of Appeals for the Ninth Circuit at San Francisco, said papers being identified as follows:

1. Petition for Injunction, filed Feb. 11, 1955.
2. Praecipe for service of copies of injunction, filed 2-11-55.
3. Summons with Marshal's Return of service thereon, filed 2-17-55.
4. Motion deft. to Dismiss, filed Apr. 20, 1955. (With transcripts 4a, 4b, 4c and 4d attached.)
8. Order of Intervention in behalf of Employers' Mutual Casualty Company of Des Moines, Iowa, filed 6-6-55.

Letter, Caldwell to Jackson, dated 8-8-55, re representation in filing suit.

14. Findings of Fact and Conclusions of Law as proposed by plaintiff, filed Aug. 18, 1955. (Unsigned.)

15. Order of Dismissal, filed Aug. 18, 1955.

16. Notice of Appeal, filed Sept. 19, 1955.

17. Bond for Costs on Appeal, filed Sept. 19, 1955.

18. Designation and Praecipe for Record on Appeal, filed Sept. 29, 1955.

19. Amended Notice of Appeal, filed Sept. 30, 1955.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office by or on behalf of the appellants for preparation of the record on appeal in this cause, to wit:

Filing fee, original Notice of Appeal at $5.00 and Amended Notice of Appeal, $5.00, and that said amounts have been paid to me by the attorneys for the appellants.

Witness my hand and official seal at Seattle, this 22nd day of October, 1955.

MILLARD P. THOMAS,
Clerk;

By /s/ TRUMAN EGGER,
Chief Deputy.

[Endorsed]: No. 14921. United States Court of Appeals for the Ninth Circuit. Continental Fire and Casualty Insurance Company, Appellant, vs. J. J. O'Leary, Deputy Commissioner, Fourteenth Compensation District, under the Longshoremen's and Harbor Workers' Compensation Act and Employers' Mutual Casualty Co. of Des Moines, Appellees. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed October 27, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14921

CLARENCE L. CALDWELL and CONTINENTAL FIRE AND CASUALTY INSURANCE CORPORATION,

Appellants,

vs.

J. J. O'LEARY, Deputy Commissioner, Fourteenth Compensation District, Under the Longshoremen's and Harbor Workers' Compensation Act,

Appellee,

and

EMPLOYERS' MUTUAL CASUALTY CO. OF DES MOINES,

Intervenor.

APPELLANTS' STATEMENT OF POINTS

1. When the claimant has sustained two injuries for which claims have been filed with the Commissioner and claimant has sustained disability as a result of both the first and the second injuries, the Commissioner is duty bound under the law to determine the disability incurred as a result of the first injury before making an award for disability caused by the second injury.

2. The Commissioner acted arbitrarily and capriciously in holding the second injury the sole cause of claimant's disability.

3. The Deputy Commissioner entered an order denying claimant compensation for his injury on May 30, 1951, without granting him a hearing on such claim.

4. That there is no evidence in the record which sustains that portion of the Findings of Fact which state: "That the injury of October 10, 1953, was the precipitating cause of the claimant's subsequent disability rather than the minor injury which he sustained on May 30, 1951."

5. That the Deputy Commissioner entered an award for disability on the injury of October 10, 1953, prior to disposal of a claim for injury on May 30, 1951.

6. That the compensation order was not in compliance with the law since it could not be properly entered fixing disability on the second injury without an order first being entered under the first claim determining the disability resulting from the first injury.

7. That the District Court entered an order dismissing the petition for injunction without considering the merits of the appeal and that such order was not in compliance with the law.

/s/ ROY E. JACKSON and

/s/ THOR P. ULVESTAD,
Attorneys for Appellants.

Receipt of copy acknowledged.

[Endorsed]: Filed November 10, 1955.

No. 14921

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CONTINENTAL FIRE AND CASUALTY INSURANCE COMPANY,

Appellant,

vs.

J. J. O'LEARY, Deputy Commissioner, Fourteenth Compensation District, Under the Longshoremen's and Harbor Workers' Compensation Act, and EMPLOYERS' MUTUAL CASUALTY CO. OF DES MOINES,

Appellees.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

BRIEF FOR J. J. O'LEARY, *Deputy Commissioner*

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Appellees.

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HONORABLE WILLIAM J. LINDBERG, *Judge*

BRIEF FOR J. J. O'LEARY, *Deputy Commissioner*

STATEMENT OF CASE

This cause arose upon a complaint for judicial review of a compensation order filed by the appellee Deputy Commissioner O'Leary on January 19, 1955 pursuant to the provision of the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, 44 Stat. 1424, 33 U.S.C. Sec. 901 et seq. Judicial review is authorized by section 21(b) of said Act, 33 U.S.C. Sec. 921 (b).

In said compensation order, the deputy commissioner awarded compensation to the employee (hereinafter called "claimant") on account of a back injury sustained on October 10, 1953 while employed by the Northern Stevedoring and Handling Corporation. The deputy commissioner specifically found that "the injury of October 10, 1953, was the precipitating cause of the claimant's subsequent disability rather than the minor injury which he sustained on May 30, 1951, while in the employ of the employer abovenamed". The appellee Employers' Mutual Casualty Company was the insurer of the employer at the time of the 1951 injury while the appellant Continental Fire and Casualty Insurance Company was the insurer at the time of the 1953 injury.

[The employee has no apparent interest in this litigation whatever. It is immaterial which insurance company pays the compensation. Presumably he was persuaded to "take sides" by the letter sent to him on August 8, 1955 by the attorney for the appellant (R. 45)* in which it was stated that his name was included as party plaintiff in an action brought by the appellant-insurer to set aside the award and that the attorneys for the deputy commissioner and the other insurance company "have made a motion asking that

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*R. refers to the printed Transcript of Record.

you be dismissed as a party plaintiff in this case because your interest may be adverse to both the insurance companies and a ruling on behalf of either insurance company might be to your disadvantage."]

THE COMPENSATION ORDER

In the compensation order complained of, the deputy commissioner found the facts to be in part as follows:

> "That on the 10th day of October, 1953, the claimant above named was in the employ of the employer above named at Seward, in the Territory of Alaska, in the Fourteenth Compensation District, established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, and that the liability of the employer for compensation under said Act was insured by Continental Fire and Casualty Insurance Corporation; that on said day, the claimant herein, while performing service as a Longshoreman for the employer and engaged in discharging cargo from the SS Seafair, which was afloat at the Army Dock, sustained personal injury resulting in his disability when, while lifting a crate weighing about four or five hundred pounds in company with three other employees he experienced a sudden pain in his lower back and legs; that he was admitted to the Seward General Hospital on October 11, 1953, where he remained until October 31, 1953, when he was transferred to the Providence Hospital in Seattle, Washington, and on November 13, 1953, a sub-total laminectomy and fusion of the lumbosacral area of his spine was performed; * * * that as a result of the injury sustained, the claimant was wholly disabled from

October 10, 1953, to September 30, 1954, inclusive, and he is entitled to 50-6/7 weeks' compensation at $35.00 for such temporary total disability; that beginning October 1, 1954, the disability of the claimant became permanent in character causing a loss of wage-earning capacity equivalent to 30% of his average weekly wage at the time of his injury, and he is entitled to compensation at the rate of $20.00 per week (⅔ of the difference between his average weekly wage of $100.00 at the time of his injury and his reduced wage-earning capacity of $70.00 per week) for such permanent partial disability; * * *

"That on November 13, 1953, the claimant filed a claim for compensation in the office of the undersigned deputy commissioner alleging that on May 30, 1951, while in the employ of the employer above named he sustained an injury while engaged in handling lumber aboard the SS 'Seafair' which was afloat at Seward, Alaska, and that on said date, while using a peavey on a timber, the peavey slipped causing him to fall backwards and to strike his back against a piece of timber, in consequence of which he is reported to have sustained a strained back; that no report of said injury was filed with the undersigned deputy commissioner by the employer until January 25, 1954; that the injury was, however, reported to the Alaska Industrial Board at Juneau, Alaska, and the claimant was paid compensation in the amount of $35.75 for temporary total disability from May 30, 1951 to June 5, 1951; that the medical reports submitted in connection with said injury indicated the claimant suffered a strained back; that subsequent to his return to work on or about June 6, 1951, the claimant was able to work whenever work was available although he had at various times experienced recurrent back pain; that the injury of October 10, 1953, was the precipitating cause of the claimant's subsequent dis-

ability rather than the minor injury which he sustained on May 30, 1951, while in the employ of the employer above named."

The court below sustained said compensation order. This appeal followed.

QUESTION PRESENTED

In paragraph XVI of the complaint it is alleged:

"That it is admitted by the parties hereto that plaintiff Caldwell sustained an injury on May 30, 1951, while employed as a longshoreman on the SS 'Seafair' at Seward, Alaska, and that on October 10, 1953, he sustained another injury to his back and spine while employed by the same employer while working aboard the SS 'Seafair' at Seward, Alaska. The question presented is whether it was the duty of the deputy commissioner to adjudicate plaintiff Caldwell's claim of back injury of May 30, 1951, when said claim was filed in his office to determine the plaintiff's time loss as a result of said injury, and also to determine the permanent partial disability which the plaintiff suffered to his spine as a result of said injury, and treatment to which he was entitled as a result of said injury.

"*It is the plaintiff's position that the deputy commissioner was duty-bound to adjudicate plaintiff's claim of injury of May 30, 1951*, and to determine his time loss, permanent partial disability and treatment he was entitled to receive as a result of said injury, *before he adjudicated the claim of injury of October 10, 1953*, and made the award referred to herein." (Italics supplied)

The only question presented in the court below

was whether the deputy commissioner was required to adjudicate the claim for the 1951 injury before he adjudicated the claim for the 1953 injury. In this court appellant-insurer attempts to raise additional issues to which we shall refer. However it is a well recognized principle that a litigant may not raise issues on appeal which were not raised below. *Moore Dry Dock Company v. Pillsbury*, 169 F. 2d 988 (C.A. 9, 1948); *Parker v. Motor Boat Sales, Inc.*, 314 U.S. 244, 251.

THE EVIDENCE

The complaint does not challenge the Findings of Fact made by the deputy commissioner in his compensation order. The resume' of the evidence given below is for the purpose, not of showing that the findings as to the two injuries are supported by evidence but merely for the purpose of familiarizing the court with the facts in the case.

At the hearing before the deputy commissioner on September 10, 1954 *Clarence L. Caldwell*, the claimant, testified in part as follows:

That on May 30, 1951 he was injured when a peavey slipped as he was trying to pry apart two bundles and he went over backwards, striking his back on a bundle of lumber or plywood or plasterboard

(App. 69);* that following his fall on May 30 1951 he worked the rest of that shift, and on the next day (he believed it was) he went to see Dr. Shelton who put him in Seward General Hospital (App. 70); that he was in the hospital five days and upon his return to work he had backache and pains when he got into certain positions (App. 71); that he did not continue under the care of Dr. Shelton (App. 71); that there were days the "job was too hard" for him and he would go home (App. 71); that after seeing a Dr. Sellers who told him it was his sacroiliac that was giving him trouble he got a back brace, in February or March of 1952 (App. 72); that on October 10, 1953 he helped to lift a crate that probably had a little more weight than he had lifted at other times and he "seemed to lose control of everything below the hips"; that the crate contained a deep freezer which weighed four or five hundred pounds (App. 73); [There was basis for the deputy commissioner doubting that the 1953 injury resulted merely from lifting a little more weight than usual in view of the claimant's brother's testimony that the injury occurred when "a load fell off a four-wheeler" App. 28]; that he went home right away, went to bed and the next morning went to the hospital where he consulted Dr. Deisher; that he remained under Dr.

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*App. refers to the appendix attached to appellant's brief.

Deisher's care until he came to Seattle on November 2, 1953 where he was treated by Dr. McLemore and an operation on his back was performed on November 13th (App. 73, 74); that he is still under Dr. McLemore's care who has not released him for work (App. 74); that he treated the injury of May 30, 1951 as a minor injury and that is how the doctor treated it (App. 76); that after such sprain *he did not consult Dr. Shelton for two days* [claimant having previously testified he believed he consulted Dr. Shelton the next day]; that he went to Dr. Shelton's office on that occasion and Dr. Shelton told him he had a slight sprain *of the muscles* of the back (App. 77); that he left the hospital on June 6, 1951 at which time Dr. Shelton advised him he could return to work (App. 77); that stevedoring work in Seward is not daily work but depends upon how many boats are in; that in some months stevedores work only two or three days (App. 78); that the first physician he consulted after he had consulted Dr. Shelton was Dr. Sellers, *a period of eight or nine months later*, although he was experiencing almost constant daily pain (App. 81); that in lifting the crate onto the deck of the ship (the 1953 injury) he turned away from it so as to give him "more room to step over" and experienced a sharp pain in the lower part of his back (about at the belt line) and in his legs (App. 87); that the pain was in "the small of" his back

and was shooting down his hip and legs (App. 88); that the pain was severe and more than he had been having because he had lifted too much weight; that the injury of October 10, 1953 occurred about 4:00 o'clock and he went home about 4:30 after waiting for the dispatcher to arrive and without finishing the shift (App. 89); that he went to the hospital the next morning where he remained about three weeks and where he was placed in a body cast before being sent to Seattle (App. 89); that x-rays were taken at the Seward hospital and he was in a body cast when he arrived in Seattle (App. 90); that Dr. Sellers gave him treatment for his sacroiliac, snapping his back "more or less like a chiropractor would" (App. 96); that such treatments (about three in number) seemed at times to ease his back condition temporarily (App. 97); that Dr. Sellers also prescribed heat treatments and hot baths (App. 97); that, other than recommending the use of a back brace and a heat pad, Dr. Sellers prescribed no other treatment (App. 102).

Dr. Ira O. McLemore, a witness called by Continental (the insurer in 1953) testified in effect that he examined the claimant at Providence Hospital, Seattle, on November 2, 1953, x-rays were taken which disclosed evidence of partial lumbarization of the first sacral segment and a spinal (pantopaque) study was made on November 5th (App. 107, 110, 111); that a

filling defect between the 5th and 6th lumbar vertebrae was noted which he felt was due to a rupture of the nucleus pulposus, and he recommended a subtotal laminectomy, removal of the nucleus, and a fusion of this area, due to the fact there was the pre-existing malformation, which operation was performed on November 11th; that certain definite adhesions appeared about the nerve roots with evidence of the previous malformation as noted in the x-rays (App. 111); that he thinks the claimant's injury of May 30, 1951 had a bearing on claimant's condition on November 2, 1953 because the history given by the claimant indicates he had not completely recovered from its effects and claimant had *additional injuries* superimposed on the condition (in the accident of October 10, 1953) (App. 113, 114); that claimant had two conditions—a ruptured nucleus with adhesions about the nerve roots, and the malformation of the spine the cause of which is an inherent weakness of the area with which back and leg pains are frequently associated (App. 114); that, while he thinks the adhesions existed for some period of time, they cannot tell at surgery when they did occur (App. 115); that he thinks claimant's pain down his leg, following the May 30, 1951 strain, was due to the adhesions (App. 116); that he thinks the adhesions would be associated with the accident of May 30, 1951 (App. 116); that he does not know of

his own knowledge of the extent of injury from the May 30, 1951 injury (App. 117); that following claimant's second injury of October 10, 1953 claimant was in a condition of total disability; that when he first examined claimant he suspected there might be present a herniated disc (App. 118); that, although atrophy is sometimes present in such cases, he has no notation of finding atrophy in claimant's left leg (App. 119); that he found no reflex changes, which changes are present sometimes in such cases; that claimant had a marked, chronic weakness of the spine because of the malformation with which claimant was born (App. 119, 120); that such a malformation usually tends to make an unstable back; that he did not determine from the appearance of the adhesions how old they were (App. 120); that a congenitally weak spine probably tends to develop adhesions more than the average, and adhesions sometimes result from infection; that the possibility exists that *claimant's adhesions were due to either infection, congenital weakness, or injury* (App. 121); that, *from the history given by claimant,* he thinks the adhesions occurred at the time of the injury two years previously, but he could not tell their cause from looking at the spine; that it appears that claimant's pre-existing condition had been aggravated by the second injury of October 10, 1953 (App. 122).

At the hearing before the deputy commissioner

on December 10, 1954, *Dr. Bernard E. McConville*, a witness called by the appellee Employers' Mutual Casualty Company (the insurer in 1951) testified in part as follows:

That he has specialized in orthopedic surgery since 1937 (App. 133); that he reviewed the report of Dr. McLemore (App. 134); that claimant's sixth lumbar vertebra is a congenital malformation and any such malformation tends to weaken, mechanically, the structure of the spine and make it prone to injury (App. 136); that such congenital defect developed since the claimant was born through the formative years; that the deformity of claimant's facets, which may be likened to a pair of door hinges, is also a part of the congenital malformation or weakness of the joint (App. 136); that since birth claimant had a weak lumbosacral joint which caused intermittent periods of back discomfort and made him more prone to injury (App. 137); that adhesions are scar tissue formations that develop secondarily to an inflammatory process (App. 138); that claimant may have had "minor disability" from the strain of May 30, 1951, after which he was able to carry on the work of a longshoreman for over two years, but because of his complete collapse following the injury of October 10, 1953 *it is his opinion the second injury was the producing factor of claimant's present disability* (App. 140);

that he does not believe that claimant's adhesions, diagnosed post-operatively as adhesive arachnoiditis, would have existed since claimant's first injury without disabling him before his complete collapse which followed immediately after the injury of October 10, 1953 (App. 141); that such condition developed as a result of a definite episode [the second injury], the impingement of the nerves going down claimant's left leg apparently being the cause of his immediate work stoppage; that he feels such condition was due to the second injury because the claimant had been able to work for over two years following the back strain of May 30, 1951 (App. 141); *that he does not think such adhesions could have existed since the first injury since claimant would have had more of a reaction if they had so existed; that an inflammatory process such as adhesions has a relatively short period in which it develops and has either to burn suddenly or burn out* (App. 141); that claimant is prone to have back pain from posture [such as the pain following the back strain of May 30, 1951 as to which claimant testified] (App. 142); that claimant could have had a disability from the first injury or over the years he may have gradually developed a weakness of his back necessitating a back brace (from the congenital condition) but claimant "*very distinctly had a severe second injury*" (App. 146); that the fact that claimant, on examina-

tion by Dr. McLemore, had definite muscle spasm after being in a cast (following the second injury) would indicate that claimant "had something severe" [resulting from the second injury] that has happened over and above [claimant's condition following the first injury], because if he had had a severe degree of muscle spasm any place * * * he would not have been able to work [following the first injury] (App. 150); that he does not think claimant's adhesions could have existed since the injury of May 30, 1951, but thinks they would have occurred *within a few weeks before the time Dr. McLemore operated on the claimant* (App. 153); that most of the pain in claimant's *congenitally deformed back would be muscular pain, which is the reason claimant got relief from wearing a belt or back brace or from sleeping on a hard bed, thereby allowing the muscles to relax* (App. 154); that the nerve pain in claimant's leg could have been caused by increased muscle tightness in the area of weakness in claimant's back (App. 155); that persons with sacroiliac slip get a kink in their back and neuralgia down the leg but it is not a definite pinching of the nerve root so as to give a definite, permanent pattern of pain (App. 156).

There was received in evidence as Exhibit No. 1 of the Employers' Mutual Casualty Company the deposition of Dr. J. H. Shelton taken on September 7, 1954

at Anchorage, Alaska (App. 41). This deposition shows in effect that Dr. Shelton saw the claimant at the hospital following his injury of May 30, 1951 and diagnosed claimant's condition as *sprained muscles of the back.* No x-rays were indicated and none were taken. The claimant was back to work in about a week and Dr. Shelton saw him no further, after having prescribed heat and rest. No type of back brace or support was prescribed by Dr. Shelton, and *he had no reason for thinking that the claimant suffered any permanent damage to his back.* Dr. Shelton's report to the Alaska Industrial Board attached to the deposition shows that the injury on May 30, 1951 consisted of "*sprained muscles of the back*", that claimant was admitted to the hospital on June 3 and discharged on June 6, 1951, that no further treatment was needed and that patient would be able to resume his regular work on June 8, 1951.

There were also received in evidence (App. 1 et seq.) depositions of claimant's co-workers on their observation of claimant at work; they do not show much beyond the fact that claimant had *two* injuries and that after the first injury claimant *worked his regular shift* "and worked right along as good as anybody" (App. 5, 9, 19).

In the above circumstances the deputy commis-

sioner found that the injury of October 10, 1953 and not the injury of May 30, 1951 was the cause of claimant's disability, subsequent to October 10, 1953.

Appellant's brief reads (pp. 5, 9) as if the deputy commissioner heard one claim, that which related to the 1951 injury, but decided the other, the one relating to the 1953 injury. A reference to the opening page of the proceedings before the deputy commissioner (App. 64) will show that the deputy commissioner as well as all the parties were well aware that as the deputy commissioner stated: "This hearing * * * is being held for the purpose of *determining the liability of the employer and insurance carrier, or insurance carriers, in connection with the injuries* the claimant, Clarence L. Caldwell, is reported to have sustained on *May 30, 1951, and October 10, 1953* * * *"

The statements made for the record at the opening of said hearing both by the attorney for the appellee Employers' Mutual Casualty Company (App. 66) and by the attorney for the appellant Continental Fire and Casualty Company (App. 67) indicate that they understood that the issue was which injury was the cause of the employee's present disability.

The testimony which follows the above statements fully confirms the understanding of all the parties. Moreover, the taking part in the proceeding before the

deputy commissioner by the attorney for the appellant and all the evidence produced by it at said hearing, medical and otherwise, would have been meaningless and in fact would have had no place at said hearing if claimant's claim for the injury of October 10, 1953 (when appellant was the insurer) were not before the deputy commissioner for adjudication.

Therefore, because the reporter entitled the transcript of hearing (App. 63) with one title instead of two it does not follow that the hearing pertained only to one claim when the entire record speaks otherwise.

ARGUMENT

I.

The Deputy Commissioner Was Not Required to Adjudicate the Claim for the 1951 Injury First.

It is to be noted that appellant insurer admitted in the complaint filed below the claimant sustained an injury on October 10, 1953 while employed by its insured (R. 11) and appellant-insurer did not allege that the findings with reference to the disability and loss of wage earning capacity resulting from such injury are not supported by the evidence. In the absence of such allegations said findings of fact in the compensation order should be accepted as true. *Anderson v. Hoage*, 63 App. D.C. 169, 70 F. 2d 773 (1934);

Luckenbach Steamship Co., Inc. v. Norton, 96 F. 2d 764 (C.A. 3, 1938); *Burley Welding Works, Inc. v. Lawson,* 141 F. 2d 964 (C.A. 5, 1944).

If then appellant-insurer did not challenge any of the findings in the order complained of relating to the 1953 injury, when such insurer was on the risk, it would seem that its contention that the deputy commissioner should first have decided the claim relating to the 1951 injury, when it was not on the risk, is without merit since it was not a "party in interest" with reference to such earlier claim. See Section 21(b), Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. Sec. 921 (b)). It is accepted law that a person may take legal action only with reference to some act or omission which affects his legal rights. What action the deputy commissioner might take or might have taken with reference to a claim for an injury sustained in 1951 in which the appellant-insurer had no legal interest whatsoever would not be of any legal concern to it.

The compensation order complained of (which admittedly is correct upon its face) is not "not in accordance with law" [the only basis for setting aside an order under Section 21(b) of the Act (33 U.S.C. Sec. 921(b)] merely because there is another unadjudicated claim before the deputy commissioner involving another injury.

But aside from the correctness from a strictly legal aspect of the deputy commissioner's action in deciding the claim for the 1953 injury first, it was proper also administratively. When two claims are filed for two separate injuries and the issue is as to which employer or which carrier is liable, it is good administrative practice first to issue the compensation order which finds liability, withholding the issuance of the order absolving from liability until the first order has become final. Otherwise, if both orders are issued simultaneously and the order awarding compensation should be set aside upon judicial review, the employee (unless he took an appeal from an order with which he is satisfied) would find that he had lost the right to compensation as to both injuries, notwithstanding that he was clearly entitled to compensation from one or the other employer or carrier. See *Tyler v. Lowe*, 138 F. 2d 867 (C.A. 2, 1943) where such a situation existed.

Moreover, even if the deputy commissioner had adjudicated the claim for the 1951 injury "before he adjudicated the claim of injury of October 10, 1953" as appellant-insurer contends that he should have done, it may be assumed that the deputy commissioner would have rejected the claim for the 1951 injury for any disability which existed subsequent to the 1953 injury consistent with the finding in the compensation order

appealed from "that the injury of October 10, 1953, was the precipitating cause of the claimant's subsequent disability rather than the minor injury he sustained on May 30, 1951." Such adjudication of the 1951 claim would not have affected appellant-insurer legally because as stated it did not pertain to a claim in which such appellant was a party. Appellant-insurer was entitled to have a finding as to the 1951 injury only insofar as it related to the question of disability after the 1953 injury. The finding in this respect was complete:

> "* * * the injury of October 10, 1953, was the precipitating cause of the claimant's *subsequent* disability rather than the minor injury which he sustained on May 30, 1951, * * *" (R. 23, 24). (Italics supplied).

Notwithstanding the quoted finding, appellant states (p. 5) that "no reference is made to the 1951 injury or to the claim filed therein in the award made by the Deputy Commissioner" but on page 11 states that "the [deputy] commissioner acted arbitrarily in holding the second injury the sole cause of claimant's disability."

As stated above appellant-insurer did not challenge said finding.

Since the only issue raised by appellant in the court below was that the deputy commissioner

should have decided the claim for the 1951 injury first, this Court is not required to consider other issues not raised in the court below. *Moore Dry Dock Company v. Pillsbury, supra.* However we shall briefly refer to the other issues raised here for the first time in the event that this Court should consider them timely raised.

II.

Section 8 (f) Not Applicable

Appellant contends (p. 10) for the first time that Section 8 (f) of the Act (33 U.S.C. Sec. 908 (f)), is applicable and that appellant should "provide compensation only for a disability caused by the subsequent injury." The difficulty with appellant's argument is that the deputy commissioner found (and the finding has not been challenged) that the second injury was the sole cause of claimant's disability. Therefore appellant as the insurer at that time is called upon to pay *only for the disability caused by the second injury,* which as stated was found to be the sole cause of such disability.

Appellant may be confused as to what constitutes "disability". The word itself is defined in Section 2 (10) of the Act (33 U.S.C. Sec. 902(10)), as the "incapacity *because of injury* to earn the wages which

the employee was receiving at the time of injury in the same or any other employment." (Italics supplied). Physical disability alone is not sufficient.

The record shows that claimant did not deny that in the year 1952 he worked *more* than in the year 1951 when the first injury occurred (App. 79), that in 1953 he earned $5,200 for ten months compared to $7,500 in 1951 for twelve months (the work is not steady, App. 3, 79). Moreover claimant's earnings of $7,500 in the year *1951* which includes seven months following the May 1951 injury does not indicate a disability for work related to that injury.

Appellant's contention (p. 17) that claimant was given easier tasks after first injury is not borne out by the record to which appellant refers. A reference to the pages cited in support of said contention (App. 99, 100) shows no such evidence. Moreover it was for the deputy commissioner as the trier of the fact to determine the credibility of the witnesses including the claimant as to his ability to work following the first injury *Wilson and Co. v. Locke*, 50 F. 2d 81 (C.A. 2, 1931); *Hudnell v. O'Hearne*, 99 F. Supp. 954 (Md. 1951). And finally claimant's inability to work, if such there was, prior to the 1953 injury may have been due to a weakness which developed from the congenital condition (App. 146). [This would also be

consistent with the high earnings in the months of 1951 immediately after the injury and with the fact that he first began to wear a back brace in the fall of 1952 over a year after the first injury (App. 5, 95).] If the disability was due to a congenital condition it was not a disability "from injury" as defined in the Act such as would entitle claimant to compensation therefor.

Assuming arguendo however that the first injury did have a residual disability which resulted in a loss of earning capacity, it is a reasonable inference that the wage which the claimant was receiving in 1953 at the time of the second injury represented his earning capacity at that time and took into consideration whatever effect the first injury left with him. It was not intended by so-called "second injury" provisions such as Section 8(f) that an insurer of an employer in whose employ the earning capacity at the time of the second injury was totally destroyed should be relieved of liability in part because the employee's earning capacity, due to a previous disability, was less than a normal person's. Such decreased earning capacity presumably has already been discounted in the employee's wage rate at the time of the second injury. *Schwab v. Emporium Forestry Co.*, 153 N.Y.S. 234, aff'd 111 N.E. 1099. Otherwise such an employee would have to pay twice for his previous disability:

first, in wage reduction due to his inability to perform as a normal person and second, in a reduction in the compensation which a normal person would receive, that is based upon the actual wage rate.

[Appellant's assertion (p. 18) that "the deputy commissioned himself felt there was disability arising out of the first injury (App. 151)" is not borne out by the record as a reference to the cited page will show.]

III.

Common Issue

The deputy commissioner had before him an issue which is quite common in compensation law although frequently difficult of solution, namely to determine which of two successive incidents is responsible for claimant's disability. It has been uniformly held that a determination by the trier of the fact either that a disability was a recurrence of a prior injury or was caused by a new and independent injury is one of fact and will not be disturbed if there be any competent evidence to support the finding. *Head Drilling Co. v. Industrial Accident Commission*, 177 Cal. 194, 170 P. 157 (1918); *Prince Chevrolet Co. v. Young*, 187 Okl. 253, 102 P. 2d 601 (1940); *Borstel's* case, 307 Mass. 24, 29 N.E. 2d 130 (1940); *Billington v. Great Lakes*

Dredge & Dock Co., 263 A.D. 1040, 33 N.Y.S. 2d 703 (1942); *Grieco v. C. R. Daniels, Inc.*, 17 N.J. Misc. 393, 9 A. 2d 671 (1940); *Taylor v. Federal Mining & Smelting Co.*, 59 Idaho 183, 81 P. 2d 728 (1938); *Hajek v. Brown*, 255 A.D. 729, 6 N.Y.S. 2d 821 (1939); *Maloney v. Utility Roofing Co.*, 45 N.Y.S. 2d 746 (1944), affirmed 293 N.Y. 915, 60 N.E. 2d 127; *Sutton & Sutton v. Courtney*, 203 Okl. 590, 224 P. 2d 605 (1950).

In the *Head Drilling Co.* case, *supra*, the Court said:

> "We are of the opinion that a subsequent incident or accident aggravating the original injury may be of such a nature and occur under such circumstances as to make such aggravation the proximate and natural result of the original injury. Whether the subsequent incident or accident is such, or should be regarded as an independent intervening cause is a question of fact for the commission, to be decided in view of all the circumstances, and its conclusion must be sustained by the courts whenever there is any reasonable theory evidenced by the record on which the conclusion can be upheld."

In the *Prince Chevrolet Co.* case, *supra*, the Court said:

> "As to whether the disability resulted from a prior injury or is an aggravation of a prior injury or is caused by a new and independent injury is a question of fact solely within the province of, and for the determination of, the State Industrial Commission, and if there is any competent evi-

dence to sustain the finding an award based thereon will not be disturbed." (Citing cases).

In *Maloney v. Utility Roofing Co., supra,* which also involved two back injuries, the court said that even though the employee at the time of the second injury had not fully recovered from the first injury, the evidence authorized compensation for the second injury alone. Accord: *Pittsburgh Plate Glass Co. v. Wade,* 197 Okl. 681, 174 P. 2d 378 (1946).

The correctness of the principle that the second injury is the compensable injury in respect to the subsequent disability regardless of the fact that but for the first injury the second might not have occurred was recognized by this court in *Pillsbury v. Liberty Mut. Ins. Co.,* 182 F. 2d 743 (1950), in which it was indicated that where there are two independent injuries the finding that the *two* employers are responsible for the disability *was incorrect.*. In other words if there are two independent injuries, the second injury of which produces the disability, such second injury is the compensable injury notwithstanding that the weakened condition of the employee makes the second injury possible.

In re Franklin, 129 N.E. 2d 906 (Mass. 1955).

Assuming, however, that under the law the determination as to the injury responsible for the dis-

ability depended upon the choice between conflicting inferences, the inference drawn by the deputy is not subject to review and will not be reweighed. *C. F. Lytle Co. v. Whipple*, 156 F. 2d 155 (C.A. 9, 1946); *Contractors, PNAB v. Pillsbury*, 150 F. 2d 310 (C.A. 9, 1945); *Liberty Mut. Ins. Co. v. Gray*, 137 F. 2d 926 (C.A. 9, 1943).

IV.

Findings Of Fact Unnecessary

Appellant complains that the court below failed to make Findings of Fact and Conclusions of Law. Rule 52 (a) of the Federal Rules of Civil Procedure (which are made applicable to proceedings for judicial review of compensation orders under the Longshoremen's and Harbor Workers' Compensation Act by Rule 81 (a) (6) of said rules) provides that Findings of Fact and Conclusions of Law are unnecessary on decisions of motions under Rule 12 and 56. The decision here was on a motion to dismiss under Rule 12.

Moreover aside from Rule 52 (a) of the Federal Rules just referred to, as the court said in *Steamship Terminal Operating Corp. v. Schwartz*, 1943 *Amer. Maritime* Cases 90, affirmed 140 F. 2d 7, there could be but one finding; that the commissioner's findings are supported by evidence and one conclusion of law; that the complaint must be dismissed.

CONCLUSION

In view of the above it is respectfully submitted that the compensation order complained of is in accordance with law and that the order of the court below sustaining it should be affirmed.

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Of Counsel

No. 14924

United States
Court of Appeals
for the Ninth Circuit

MARY EDITH DAULTON, Administratrix of the Estate of Donald LeRoy Daulton, deceased,
Appellant,

vs.

SOUTHERN PACIFIC COMPANY, a corporation,
Appellee.

Transcript of Record

Appeal from the United States District Court for the District of Oregon

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif. —2-8-56

No. 14924

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In the District Court of the United States, Northern District of California, Southern Division

No. 33623

AGNES B. THOMPSON, Administratrix of the Estate of DONALD L. DAULTON, deceased,
Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a corporation,
Defendant.

COMPLAINT FOR DAMAGES AND DEMAND FOR JURY

Plaintiff complains of defendant and for cause of action alleges:

I.

That heretofore and on the 19th day of February, 1954, by an order of the Superior Court of the State of California, in and for the County of Alameda, duly given and made, the above named plaintiff was appointed administratrix of the estate of Donald L. Daulton, who died on the 6th day of October, 1952, and who was at the time of his death a resident of the City of Klamath Falls, County of Klamath, State of Oregon, and that ever since said date plaintiff has been and now is the duly appointed, qualified and acting administratrix of the estate of said decedent.

II.

That at all times herein mentioned defendant was and now is a duly organized and existing corpora-

tion doing business in the State of California and other states; that at all times herein mentioned defendant was and now is engaged in the business of a common carrier by railroad in interstate commerce in said state of California, and other states.

III.

That at all times herein mentioned defendant was a common carrier by railroad engaged in interstate commerce and Donald L. Daulton, deceased, was employed by defendant in such interstate commerce and the accident complained of arose while decedent and defendant were engaged in the conduct of interstate commerce.

IV.

That this action is brought under and by virtue of the provisions of the Federal Employers' Liability Act, 45 U.S.C.A. 51, et seq. and the Federal Boiler Inspection Act, 45 U.S.C.A. 23 et seq.

V.

That on or about the 6th day of October, 1952, at or about the hour of 2:58 p.m. thereof, decedant was employed by the defendant as a brakeman working on defendant's eastbound work train Engine No. 2716 which was moving in an easterly direction on the defendant's right of way west of the west switch at Wocus, Oregon, approximately 2½ miles north of Klamath Falls, Oregon.

VI.

That at said time and place decedent, acting in

the regular course and scope of his duties, was standing on the lead footboard on the engineer's side of said engine; that at said time and place said engine and its parts and appurtenances were improper and unsafe to operate in the service to which the same were put in that the said footboard upon which decedent was standing was so improperly fastened to the steel braces supporting the same that the head of a bolt was caused to and did protrude above the surface of said footboard by reason of which decedent was caused to fall from the footboard and onto defendant's tracks as a proximate result of which decedent received certain injuries which instantly resulted in his death.

VII.

That at said time and place the said engine and all of its parts and appurtenances were in an improper, unsafe and defective condition in violation of Section 23 of the Boiler Inspection Act, Title 45 on Railroads, U.S.C.A.

VIII.

That at the time of his death said Donald L. Daulton left surviving him as his heirs at law his widow, Mary Edith Daulton, and his minor children Gary Wayne Daulton, aged 6 years, and Virginia Geraldine Daulton, aged 4 years, who were dependent upon said decedent for their maintenance and support.

IX.

That at the time of his death decedent was a well

and a able bodied man of the age of Thirty-three years, and was earning and receiving from his employment with defendant the sum of approximately $575 per month which he contributed to the support of his widow and minor children aforementioned.

X.

That by reason of the facts hereinabove set forth and as a direct and proximate result thereof, plaintiff has been generally damaged in the sum of $150,000.

Wherefore, etc.

As and for a second, further, separate and distinct cause of action against defendant, plaintiff alleges as follows:

I.

Plaintiff refers to paragraphs I, II, III and IV of the first cause of action and by reference thereto incorporates the same herein with the same force and effect as though set out at length and in full herein.

II.

That on the 6th day of October, 1952, at or about the hour of 2:58 o'clock p.m. thereof decedent was employed by defendant as a brakeman working on defendant's eastbound work train Engine No. 2718 which was moving in an easterly direction on defendant's mainline track at or near the west switch switch of Wocus, Oregon, approximately 2½ miles north of the Town of Klamath Falls, Oregon.

III.

That at said time and place decedent acting in the regular course and scope of his duties, was standing on the lead footboard of the engineer's side of said engine preparing to alight therefrom for the purpose of lining a switch; that at said time and place said engine and all its parts and appurtenances were improper and unsafe to operate in the service to which the same were put in that the headlight on Engine No. 2718 was improperly attached to the center of the smoke box door of said engine thereby impeding the passage of decedent from the right lead footboard of said engine; that as a direct and proximate result thereof decedent was caused to and did fall from said footboard to the tracks of said defendant as a proximate result of which he received certain injuries which instantly resulted in his death.

IV.

That at said time and place the said engine and all of its parts and appurtenances were in an improper, unsafe and defective condition in violation of Section 23 of the Boiler Inspection Act, Title 45 on Railroads, U.S.C.A.

V.

Plaintiff refers to paragraphs VIII, IX and X of the first cause of action and by reference thereto incorporates the same herein with the same force and effect as though set out at length and in full herein.

Wherefore, etc.

As and for a third, further, separate and distinct cause of action against defendant, plaintiff alleges as follows:

I.

Plaintiff refers to paragraphs I, II and III of the first cause of action and by reference thereto incorporates the same herein with the same force and effect as though set out at length and in full herein.

II.

That this action is brought under and by virtue of the provisions of the Federal Employers' Liability Act, 45 U.S.C.A. 51, et seq.

III.

That on or about the 6th day of October, 1952, at or about the hour of 2:58 o'clock p.m. thereof decedent was employed by defendant as a brakeman working on defendant's eastbound work train engine No. 2718 which was moving along and upon defendant's tracks west of the west switch of Wocus, Oregon, approximately 2½ miles north of Klamath Falls, Oregon.

IV.

That at said time and place acting in the regular course and scope of his duties, decedent was standing on the lead footboard on the engineer's side of said engine preparing to alight from said engine for the purpose of lining a switch; that at said time and place the defendant by and through its em-

ployees other than said decedent so carelessly and negligently controlled, operated, and propelled said locomotive and train so as to cause said decedent to fall to the tracks of the said defendant and to receive certain crushing injuries which instantly resulted in his death.

V.

Plaintiff refers to paragraphs VIII, IX and X of the first cause of action and by reference thereto incorporates the same herein with the same force and effect as though set out at length and in full herein.

Wherefore, etc.

As and for a fourth, further, separate and distinct cause of action against defendant, plaintiff alleges as follows:

I.

Plaintiff refers to paragraphs I, II and III of the first cause of action and by reference thereto incorporates the same herein with the same force and effect as though set out at length and in full herein.

II.

That this action is brought under and by virtue of the provisions of the Federal Employers' Liability Act, 45 U.S.C.A. 51, et seq.

III.

That on or about the 6th day of October, 1952, at or about the hour of 2:58 o'clock p.m. thereof, decedent was employed by defendant as a brake-

man working on defendant's eastbound work train engine No. 2718 which was moving along and upon defendant's tracks west of the west switch of Wocus, Oregon.

IV.

That at said time and place acting in the regular course and scope of his duties, decedent was standing on the lead footboard on the engineer's side of said engine preparing to alight from said engine for the purpose of lining a switch; that at said time and place the defendant, its agents, servants, and employees, so carelessly and negligently owned, operated, maintained, managed, and controlled said locomotive and train as to cause said decedent to fall to the tracks of the said defendant and to receive certain crushing injuries which instantly resulted in his death.

V.

Plaintiff refers to paragraphs VIII, IX and X of the first cause of action and by reference thereto incorporates the same herein with the same force and effect as though set out at length and in full herein.

Wherefore, plaintiff prays judgment against defendant in the sum of $150,000, together with her costs of suit incurred herein.

HILDEBRAND, BILLS & McLEOD,
JAMES A. MYERS

/s/ By JAMES A. MYERS,
Attorneys for Plaintiff

Comes now the plaintiff and announces that a jury is required in said cause, as provided in Rule 38B of the Federal Rules of Civil Procedure.

Dated: May 20, 1954.

HILDEBRAND, BILLS & McLEOD,
JAMES A. MYERS

/s/ By JAMES A. MYERS

Duly Verified.

[Endorsed]: Filed May 24, 1954.

[Title of District Court and Cause.]

ANSWER

Comes now, Southern Pacific Company, a corporation, the defendant above named, and answering the complaint of the plaintiff on file herein, and each alleged cause of action thereof, shows as follows:

I.

Admits and avers as follows:

1. At all times mentioned in the complaint and herein this defendant was, and now is, a corporation duly organized and existing under and by virtue of the laws of the State of Delaware and doing business in the State of California and other states, and at all times was, and now is engaged, in the business of a common carrier by railroad in interstate commerce in the State of California and in other states.

2. On or about the 6th day of October, 1952, at or about the hour of 2:58 p.m. thereof, decedent, Donald L. Daulton, was employed by the defendant as a brakeman working on defendant's eastbound work train, Engine No. 2718, which was moving in an easterly diection on Defendant's right-of-way west of the west switch at Wocus, Oregon, approximately four miles north of Klamath Falls, Oregon. At that time and place decedent received certain injuries which instantly resulted in his death.

3. At the time of his death, and for considerable period of time prior thereto, decedent, Donald L. Daulton, was a resident of the City of Klamath Falls, County of Klamath, State of Oregon.

II.

Defendant is without information or belief on the subject sufficient to enable it to answer the allegations of the complaint and each of the alleged causes of action thereof with respect to surviving dependents, decedent's contribution to said dependents, if any, decedent's general health prior to the accident and decedent's conduct, except as hereinabove admitted or denied.

III.

Defendant denies the allegations of paragraphs I, II, III, IV, V, VI, VII, VIII, IX and X of the first alleged cause of action of the complaint, the allegations of paragraphs I, II, III, IV and V of the second alleged cause of action, the allegations of paragraphs I, II, III, IV and V of the third

alleged cause of action, and the allegations of paragraphs I, II, III, IV and V of the fourth alleged cause of action, except as hereinabove admitted or denied. Defendant denies each and every allegation of the complaint, and of each and every alleged cause of action thereof, not hereinabove admitted or denied. Defendant denies that plaintiff has been damaged in the sum of $150,000.00, or any lesser sum or any sum at all.

And for separate and independent answer and defense to the complaint and each and every cause of action thereof, defendant Southern Pacific Company shows as follows:

I.

Defendant here repeats and alleges all of the matters set forth in paragraph I of the first answer and defense above and incorporates them herein by reference the same as though fully set forth at length. If decedent, Donald L. Daulton, was injured in the manner alleged in the complaint or any of the alleged causes of action thereof, defendant is informed and believes and upon such information and belief alleges that decedent was negligent in the premises and in those matters set forth in the complaint and in each and every cause of action thereof and negligently conducted himself in and about and in respect to said locomotive and foot board, and that he negligently performed his duties as a brakeman with the result that he was fatally injured. Said conduct and said negligence of decedent, as aforesaid, proximately caused and

contributed to the injuries and damages, if any, alleged by the plaintiff.

And for a separate independent answer and defense to the complaint and each and every alleged cause of action thereof, defendant Southern Pacific Company shows as follows:

I.

Defendant here repeats and alleges all of the matters set forth in paragraph I of the first answer and defense above and incorporates them herein by reference the same as though fully set forth at length. If decedent, Donald L. Daulton, was injured in the manner alleged in the complaint or any of the alleged causes of action thereof, defendant is informed and believed and upon such information and belief alleges that decedent was negligent in the premises and in those matters set forth in the complaint and each and every cause of action thereof and negligently conducted himself on and about and in respect to said locomotive and foot board and negligently performed his duties as a brakeman with the result that he was fatally injured. Said conduct of decedent, as aforesaid, was the sole cause and the sole proximate cause of the injuries and damages, if any, alleged by the plaintiff.

Wherefore, defendant prays that plaintiff take nothing by her complaint on file herein, or any alleged cause of action thereof; that defendant have

a judgment for its costs of suit incurred herein; and for such other, further and different relief, the premises considered, is proper.

/s/ A. B. DUNNE,
/s/ DUNNE, DUNNE & PHELPS,
Attorneys for Defendant

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 18, 1954.

[Title of District Court and Cause.]

PRETRIAL ORDER

The above entitled cause came on regularly for pretrial conference before the undersigned judge of the above entitled court on the 3rd day of August, 1955. Plaintiff appeared by D. W. Brobst and Edwin E. Driscoll, her attorneys. Defendant appeared by John Gordon Gearin, of its attorneys. The parties with the approval of the court agreed to the following

Statement of Facts

I.

On or about the 6th day of October, 1952, at or near the hour of 3:00 o'clock p.m. thereof, one Donald LeRoy Daulton was employed by defendant as a brakeman working on defendant's eastbound work train which was moving in an easterly direction on defendant's right of way in the vicinity of

Wocus, Klamath County, Oregon. At said time, said Donald LeRoy Daulton and the defendant were engaged in interstate commerce or in the furtherance thereof. At said time and place said Donald LeRoy Daulton received injuries which resulted in his immediate death.

II.

At the time of his death and for a considerable period of time prior thereto said Donald LeRoy Daulton was a citizen, resident and inhabitant of Klamath County, Oregon. Defendant at all times was and now is a Delaware corporation duly authorized to do business in the State of Oregon and is engaged in the operation of a railroad.

Plaintiff's Contentions

I.

Plaintiff contends that she is a citizen, resident and inhabitant of the State of Oregon and that on or about the 2nd day of August, 1955, by order of the Circuit Court of the State of Oregon in and for the County of Klamath, duly given and made, the above named plaintiff was appointed administratrix of the estate of Donald LeRoy Daulton and that ever since said date plaintiff has been and now is the duly appointed, qualified and acting administratrix of the estate of said decedent.

II.

Plaintiff contends that on the date aforesaid, said Donald LeRoy Daulton was standing on the lead footboard of a certain engine of defendant when

said footboard was improper and unsafe in that the said footboard was so improperly fastened to the steel braces supporting the same that the head of a bolt was caused to and did protrude above the surface of said footboard by reason of which said Donald LeRoy Daulton was caused to fall from the footboard and to receive his fatal injuries.

III.

Plaintiff contends that at said time and place while decedent was acting in the course and scope of his duties the defendant was careless and negligent in the following respects; that the bolts on the footboard where he was standing were not properly countersunk; that the footboard was unsafe in violation of the Federal Boiler Inspection Act (45USCA23); that deceased was allowed to ride on the footboard of the engine; that the train was not stopped immediately in accordance with custom and practice when the deceased went out of the vision of the other members of the train crew; that the engineer was operating the train and controlling the movements of the train without signals from the train crew; that the engineer was relying upon signals for the movement of his train from the conductor or the rear trainman, whereas the movement of the train should have been controlled by signals from the deceased or head brakeman. That by reason of the aforesaid conduct the said deceased, Donald LeRoy Daulton, was caused to fall from the footboard of said engine and receive his fatal injuries.

IV.

That the applicable company rules are Rules M, 7B, and 108.

V.

Plaintiff contends that at the time of his death said Donald LeRoy Daulton left surviving him as his heirs at law his widow, Mary Edith Daulton, and his minor children, Gary Wayne Dalton, aged 6 years, and Virginia Geraldine Daulton, aged 4 years, who were dependent upon said decedent for their maintenance and support.

VI.

Plaintiff contends that at the time of his death decedent was a well and able bodied man of the age of thirty-three years and was earning and receiving from his employment with defendant the sum of approximately $575.00 per month which he contributed to the support of his widow and minor children aforementioned.

VII.

Plaintiff, by reason of the foregoing, has been generally damaged in the sum of $150,000.00.

Defendant denies the foregoing and specifically denies that said engine or any parts or appurtenances were improper or unsafe or that it was guilty of negligence or that any act or omission on its part constituted a proximate cause of the death of said deceased.

Issues to be Determined

I.

Was defendant's engine improper or unsafe in any of the particulars charged and, if so, was such a proximate cause of the death of the deceased?

II.

Was the defendant guilty of negligence in any particular as charged and, if so, was such a proximate cause of the death of the deceased?

III.

What is the amount of plaintiff's damage?

Jury Trial

Plaintiff made timely request for trial by jury.

Physical Exhibits

Certain physical exhibits have been identified and received as pretrial exhibits, the parties agreeing, with the approval of the court, that no further identification of exhibits is necessary. In the event that said exhibits, or any thereof should be offered in evidence at the time of trial, said exhibits are to be subject to objection only on the ground of relevancy, competency and materiality.

Plaintiff's Exhibits

A. Picture of right front footboard of Engine 2718.

B. Picture of right front footboard of Engine 2718.

C. Picture of right front footboard of Engine 2718.

D. Actuarial table.

E. Transcript of Rules M, 7B and 108.

Defendant's Exhibits

1. Sealed Exhibit.
2. A to R Photographs.
3. Relay Report.
4. Wage Report.
5. Map.
6. Inspection Report.
7. A to R Inspection and Repair Reports.

The parties hereto agree to the foregoing pretrial order and the court being fully advised in the premises

Now orders that the foregoing pretrial order shall not be amended except by consent of both parties, or to prevent manifest injustice; and it is further

Ordered that the pretrial order supersedes all pleadings; and it is further

Ordered that upon trial of this cause no proof shall be required as to matters of fact hereinabove specifically found to be admitted, but that proof upon the issues of fact and law between plaintiff

and defendant as hereinabove stated shall be had.

Dated at Klamath Falls, Oregon this 3rd day of August, 1955.

/s/ JAMES ALGER FEE,
Judge

Approved:

/s/ D. W. BROBST,
Of Attorneys for Plaintiff

/s/ JOHN GORDON GEARIN,
Of Attorneys for Defendant.

[Endorsed]: Filed August 3, 1955.

[Title of District Court and Cause.]

VERDICT

We, the jury, duly impaneled and sworn to try the above entitled case, do find our verdict in favor of defendant against plaintiff.

Dated this 4th day of August, 1955.

/s/ H. E. HAMAKER,
Foreman

[Endorsed]: Filed August 4, 1955.

In the United States District Court for the District of Oregon

Civil No. 7687

MARY EDITH DAULTON, Administratrix of the Estate of Donald LeRoy Daulton, Deceased, Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a corporation, Defendant.

JUDGMENT ORDER

The above-entitled cause came on regularly for trial before the undersigned judge of the above-entitled court and a jury at Klamath Falls, Oregon, on Wednesday, August 3, 1955. Plaintiff appeared by D. W. Brobst and Edwin E. Driscoll, her attorneys. Defendant appeared by John Gordon Gearin and R. B. Maxwell, of its attorneys. An order of substitution having been entered whereby the present plaintiff was substituted as party plaintiff in the place and stead of Agnes B. Thompson, the California administratrix, and the parties having stipulated in open court that no question would be raised by either party with respect to the transfer of the cause from the United States District Court for the Northern District of California, Southern Division, and both parties agreeing that the present case may be tried and judicially determined as though originally filed in the United States District Court for the District of Oregon and an amended

pretrial order having been approved by the parties and entered, the trial commenced after a jury was duly empaneled and sworn and opening statements had been made.

Evidence on behalf of both parties was introduced and received and thereafter and on the 4th day of August, 1955 when both parties had rested arguments to the jury were made and the court duly instructed the jury as to the law. Thereafter, and on the same day the jury, having deliberated, returned into open court its verdict in words as follows (formal parts omitted):

"We, the jury, duly impaneled and sworn to try the above entitled case, do find our verdict in favor of defendant and against the plaintiff.

H. E. HAMAKER,
Foreman"

Said verdict was received and filed and based thereon, it is hereby

Ordered and adjudged that plaintiff take nothing by her complaint and that defendant recover judgment of and against plaintiff, together with its costs and disbursements taxed herein at $100.12.

Dated this 4th day of August, 1955.

/s/ JAMES ALGER FEE,
Judge

[Endorsed]: Filed August 11, 1955.

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Comes now the plaintiff, Mary Edith Daulton, Administratrix of the estate of Donald LeRoy Daulton, in the above entitled cause and moves the Court to set aside the verdict and the judgment entered thereon and grant to the plaintiff a new trial as to all issues for the following reasons:

1. That the verdict is contrary to the evidence;
2. That the verdict is contrary to the weight of the evidence;
3. That the verdict is contrary to the law;
4. That the Court erred in giving to the jury instructions involving the contributory negligence of the deceased and instructed the jury further that if deceased's contributory negligence was the sole cause of the accident there could be no recovery by the plaintiff;
5. That the defendant did not disclose at the pretrial conference the defense that the pictures submitted by the plaintiff showing the running board of the engine involved in the accident were not of the running board actually on the engine at the time of the accident.
6. That the evidence is insufficient to sustain the judgment.

/s/ HILDEBRAND, BILLS & McLEOD,
/s/ D. W. BROBST,
Attorney for Plaintiff

Affidavit of Service by Mail attached.
[Endorsed]: Filed August 17, 1955.

[Title of District Court and Cause.]

AFFIDAVIT IN OPPOSITION TO PLAINTIFF'S MOTION FOR NEW TRIAL

State of Oregon,
County of Multnomah—ss.

I, John Gordon Gearin, being first duly sworn, depose and say: That plaintiff in her motion for a new trial, Sub-paragraph 6, contends that defendant did not disclose at the pretrial conference the defense that the pictures submitted by plaintiff showing the running board of the engine involved in the accident were not of the running board actually on the engine at the time of the accident, and in her motion, Page 2, contends that at the trial without previous notice to plaintiff, defendant introduced evidence to show that the running board of the engine had been changed the morning following the accident and before plaintiff's witnesses saw the running board, and contends that plaintiff showed the defendant pictures of the running board and that at the time of pretrial conference there was no indication that such running board was not on at the time of the accident and further contends that this alleged fact was not developed until the second day of trial and that plaintiff had no way of knowing that the running board had been changed.

I make this affidavit in opposition to the foregoing contentions and claims of the plaintiff. The plaintiff at no time made any request for admission with respect to the photographs which in fact were taken approximately fourteen months following the

accident and made no use whatsoever of the discovery procedure permitted under the Federal Rules of Civil Procedure.

The matter of the removal of the footboard and pilot from the locomotive following the accident was discussed between Mr. Brobst and myself the evening before the trial and before the pretrial order was submitted to the court. I talked to Mr. Brobst in the Willard Hotel by telephone the evening before trial and the subject of the conversation was the footboard because Mr. Brobst had directed a Mr. Guderian, commercial photographer in Klamath Falls, whose offices and place of business are located at North Main Street, to take photographs of the front of the locomotive after the original footboard had been replaced, i.e. on Tuesday, August 2, 1955. (Mr. Guderian is the same individual whose office took the pictures of the locomotive fourteen months after the accident). I believe that Mr. Brobst had photographs of the original pilot of the locomotive in his possession before the trial commenced.

With respect to the photographs, the pretrial order as finally submitted and agreed upon by the parties contained the notation that the defendant did not waive the identity of the photographs which were marked as plaintiff's exhibits and which were the photographs taken fourteen months after the accident.

It was disclosed to the jury in my opening statement that the footboard had been removed immediately after the accident and plaintiff made no

request for continuance or made no objection thereto until the filing of her motion for new trial herein. The plaintiff did not claim surprise during the trial. The failure of the plaintiff to exercise her rights under the federal discovery procedure and to produce at trial photographs accurately portraying the locomotive, its footboard and pilot, in no way relate to a matter of defense.

/s/ JOHN GORDON GEARIN,
Of Attorneys for Defendant

Subscribed and sworn to before me this 24th day of August, 1955.

[Seal] /s/ NOELLE BURTON,
Notary Public for Oregon

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 25, 1955.

[Title of District Court and Cause.]

ORDER

Plaintiff's motion for a new trial came on regularly for hearing before the undersigned judge at San Francisco, California on Friday, October 14, 1955 at the hour of 2:00 o'clock p.m. Plaintiff appeared by D. W. Brobst, of her attorneys, and defendant appeared by John Gordon Gearin, of its attorneys. The court having heard argument of counsel and being fully advised in the premises

Now orders that plaintiff's motion for new trial be and the same hereby is denied.

Dated this 24th day of October, 1955.

/s/ JAMES ALGER FEE,
Judge

[Endorsed]: Filed October 24, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given, that Mary Edith Daulton, Administratrix of the Estate of Donald LeRoy Daulton, deceased, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 4th day of August, 1955.

/s/ D. W. BROBST,
Attorney for Appellant

Affidavit of Service by Mail attached.

[Endorsed]: Filed October 24, 1955.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, R. DeMott, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Complaint; Answer; Pre-trial order; Verdict; Judg-

ment order; Plaintiff's motion for new trial; Affidavit in opposition to plaintiff's motion for new trial; Order denying motion for new trial; Notice of appeal; Undertaking on appeal; Designation of record; Order to include exhibits in record on appeal; Appellee's designation of record and Transcript of docket entries, constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 7687, in which Mary Edith Daulton, administratrix of the Estate of Donald LeRoy Daulton, Deceased is the plaintiff and appellant and Southern Pacific Company, a corporation is the defendant and appellee; that the said record has been prepared by me in accordance with the designations of contents of record on appeal filed by the appellant and the appellee, and in accordance with the rules of this court.

I further certify that there is being forwarded under separate cover Plaintiff's exhibits A, B, C, D, E, and F—and Defendant's exhibits 1, 2a to 2k; 2m and 2n; 2q; 3, 5, and 6. Counsels' opening statements to jury and the reporter's transcript will be forwarded at a later date.

I further certify that the cost of filing the notice of appeal, $5.00, has been paid by the appellant.

In testimony whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 13th day of December, 1955.

[Seal] R. DE MOTT,
Clerk

In the United States District Court, District of Oregon

Civil No. 7687

MARY EDITH DAULTON, Administratrix of the Estate of Donald LeRoy Daulton, Deceased,
Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY,
a corporation, Defendant.

Klamath Falls, Ore., August 3, 1955

Before: Honorable James Alger Fee, Judge, Court of Appeals, Ninth Circuit, sitting by assignment as one of the judges of the above-entitled Court.

Appearances: Messers. D. W. Brobst and Edwin E. Driscoll, of the counsel for plaintiff. Mr. John Gordon Gearin and Mr. R. B. Maxwell, of counsel for defendant.

OPENING STATEMENTS TO THE JURY

Mr. Brobst: If the Court please, and Ladies and Gentlemen of the Jury—I should say Lady and Gentlemen of the Jury—at this time I will state to you what we expect to prove by our [1*] witnesses on the witness stand. The purpose of my making this statement now is that so you may better follow

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* Page numbers appearing at top of page of original Reporter's Transcript of Record.

the testimony as it is produced on the witness stand. Sometimes in a case of this type it is difficult to have the witnesses in proper order, so that the testimony comes in piecemeal, so what I tell you now you can have in mind as we are attempting to introduce our evidence and you will be better able to follow the testimony.

The evidence will show that the deceased, Mr. Daulton, was employed by the Southern Pacific Company as a brakeman. He was working on a work train out here at Wocus, which is a little distance north of town. They were putting in a traffic control system out there and they had been working along there during the day.

At the time the accident happened there was a train that was coming by going south and one going north. So that the jury won't be confused, there are different directions. The railroad men say one direction which sometimes is opposed to the compass direction. In other words, a train that is leaving Klamath Falls and going toward Portland the railroad men say that is going east. It may be actually going north, but the railroad men say east. If it is coming toward Klamath Falls from Portland, they say it is westbound. I will try to keep the record straight as the witnesses testify, but sometimes lay witnesses will say north and railroad men will say [2] east, and it seems like there is a conflict whereas there really isn't. But we will endeavor to keep that clear as the witnesses testify.

At any rate, they were out on this work train, and there was a train that was coming south and

there was one going north, and this work train had proceeded to get into the clear so that these trains could pass along on the main line. They had to go for a distance of about three-quarters of a mile, I think the testimony will be, or in the neighborhood of 75 to 100 car lengths, a car length being estimated at 50 feet. That would run somewhere around 5,000 feet that they had to move the work train.

As they started out the conductor was stationed in the caboose, one of the brakemen known as the rear brakeman was riding along on the rear step of the caboose on the engineer's side, and the deceased, Mr. Daulton, was riding on the front right-hand running board of the engine, or footboard, which is out in front of the engine. The move was being made in an easterly direction according to railroad terms and a northerly direction according to the compass. As they started out down the track they proceeded along about 15 or 20 miles per hour, and as they approached the switch where they were to turn off to get out of the way of these other trains the speed of the move was cut down to around somewhere between two, three and four miles an hour; in other words, to a very [3] slow speed.

Mr. Daulton was out on the front of the engine so he could control the movement along there. There were workmen working there. I believe there were welders on the track that were putting in a signal system of some kind. He rode along there on the front footboard, and it was his duty when they came up to where the switch was to stop the move, get off and throw the switch and get back on and they

would ride on out into the clear with the train.

Now the evidence will show this: That there was a custom and practice on the railroad which is so firmly fixed in the minds of the workmen that it is almost a mandatory rule that when an engineer is taking signals from a brakeman or another trainman and that trainman goes out of the vision of the engineer he should immediately stop the train.

As they came down there I believe the evidence will show that this move was some five, six or seven car lengths away from the switch, and proceeding at a speed of from two to four miles an hour, right in that vicinity, and that Mr. Daulton went out of the vision of the engineer; that the engineer nevertheless continued on for those four or five car lengths, and then of his own accord, and without a signal from anyone, stopped the train. The evidence will show from the personal affects that were scattered along the track that [4] Mr. Daulton had been dragged some four or five car lengths before the move came to a stop, and the evidence will also show that the move as it was going along there could have been stopped in a matter of two, three or four feet by an application of the brakes, so that when Mr. Daulton had gone out of the vision of the engineer an immediate application of the brakes would have stopped the move in two or three feet and Mr. Daulton would not have been dragged the four or five car lengths that the evidence will show happened.

The evidence will further show that the running board on the front end of the engine is secured with

steel brackets that hold a board which is about ten inches or a foot wide and about two inches thick, and there are bolts that go down through the footboard to hold it to these brackets. The evidence will show that on that particular running board or footboard on the front of the engine the bolts were not completely countersunk. In other words, they are a rounded type of carriage bolt—we will have pictures that you can see—and the rounded type of carriage bolt, being metal, extends up above the wooden part of the platform, making a hard, smooth surface to step on, and instead of having the bolts completely countersunk so that there would be no smooth metal extending above the board the evidence will show that one bolt in the center of the footboard extended up and was tilted so that one edge of it was up in the neighborhood [5] of three-eighths to a quarter of an inch, sufficient to catch the heel of a workman walking or standing there on the front of the engine. So that made it an unsafe place to stand or to work.

That question will be left to you to determine, as to exactly how this accident happened. That falls within your province as triers of the facts. We will present the facts that I have told you about.

As a result of these conditions, and the failure of the engineer to follow the custom of immediately stopping when a trainman goes out of his vision—he was out there for the purpose of guiding the train and giving signals, and if he were not out there for that purpose the evidence will show that it was then the duty of the engineer to see that Mr.

Daulton rode in the cab of the engine instead of on the footboard, unless he was out there for the specific purpose of guiding the movement of the train.

The evidence will show that Mr. Daulton at the time of his death was 34 years old; that he was earning in the neighborhood of $550 per month; that he was the sole support of Mrs. Daulton and the two minor children.

I believe that covers it.

Mr. Gearin: If the Court please, and Lady and Gentlemen: I think we should introduce ourselves. Those of you around this part of the county know Mr. Driscoll and my associate, [6] Mr. Maxwell. My name is John Gearin, and I practice law in Portland. I am with the firm of Koerner, Young, McColloch & Dezendorf in that city. The lawyer who has just spoken to you is Mr. D. W. Brobst of Oakland, California. He is associated with the firm of Hildebrand, Bills & McLeod of that city.

The issues in this case are primarily these as to the charges and contentions of negligence made against the company: It is the contention of the plaintiff, Mrs. Daulton, that there was a defect in the engine and the company was guilty of negligence in having something the matter with the headlight or the light on the locomotive, and that there was a defect in the footboard.

One of the most difficult questions for you to determine is the question of proximate cause, the question of what caused the accident. You will hear the testimony of those people who were there.

The welders that were along the side of the railroad that Mr. Brobst mentioned were perhaps 1,000 or 1,500 feet away from where the accident occurred.

Now the work train was proceeding, and the engineer was in the cab looking out. It was his duty to see the signal up there at the siding, where they had to get off the main track because there was a Great Northern train coming down. It was about 3:00 o'clock in the afternoon, or just before, [7] and they had to put the work train in on the siding. It was the obligation of the engineer to watch for the signal so that when he got up there he could stop, and then the deceased would get off the footboard.

Now, with regard to the allegations or charges of custom and practice that Mr. Brobst has just mentioned, this is the first time that we have been advised that it was a question of custom and practice. We will answer that by saying that the testimony will be the deceased, Mr. Daulton, could have ridden in the cab of the locomotive had he so desired, but he chose to ride out there; that the engineer would, in any event, have stopped the locomotive at the switch so that the brakeman could either have gotten off the front end or gotten out of the cab and went up and turned the switch to allow the train to go into the siding.

Now as far as the negligence of the company is concerned, first of all the primary charge is being made that there was this bolt sticking up in the middle of the footboard. Now this accident hap-

pened around 3:00 o'clock in the afternoon. The train got in at dark or almost dark that night. Immediately photographs of that engine and footboard were taken. The photographs taken the night of the accident will disclose that there was no bolt whatsoever in the middle of the footboard. The next morning the locomotive and the footboard was again photographed, and we will have those photographs here for you. And [8] because something happened, or something may have happened to the footboard—it may have been bumped or something like that—the board was removed the morning after the accident. It has been put aside in the storeroom until yesterday, when it was replaced on the locomotive.

The photographs about which Mr. Brobst has told you and which he has exhibited to us—because in Federal practice we exhibit all our exhibits to the other party—those photographs were taken after the footboard was replaced, and where is there a picture of a bolt in the middle which, according to my interpretation of the photographs, will show that it is practically level with the board. It is one of those round-headed bolts that is right down flat into the wood. But the photographs Mr. Brobst will identify to you were taken by Mr. Guderion, a local photographer, in the month of December, 1953, a little over a year and two months after the accident. It will be our evidence, and I think a preponderance of the evidence, that the footboard upon which the deceased was riding was absolutely free of all obstructions. At least, the engine was in-

tratrix was appointed. We want to stipulate for the substitution of Mrs. Daulton as plaintiff. She is a duly qualified and acting Administratrix of the Estate of Donald LeRoy Daulton, Deceased. With that preliminary matter we are ready to proceed. Our exhibits have been marked by the Court Reporter, and I have submitted to the Clerk our requested instructions. We are ready to proceed if the Court will permit the substitution, which we are willing to stipulate to.

Mr. Brobst: That is correct.

The Court: The stipulation will be observed and the substitution made. The pleadings will be deemed to be amended with this Oregon administratrix as plaintiff, and that she has power to bring the action.

I shall ask a stipulation of the parties that no error will be claimed upon the ground that this case was originally filed with a different party plaintiff in the Northern District of California, and that it will be tried on the same basis by consent of the parties as if it had been originally filed in this jurisdiction with the present plaintiff.

Mr. Gearin:: We so stipulate on behalf of the defendant. [2]

Mr. Brobst: We so stipulate.

(Thereupon a jury was duly and regularly empaneled and sworn to try the above-entitled cause.)

The Court: Proceed.

Mr. Probst: Your Honor, before taking of testimony could we have an order excluding the witnesses?

Mr. Gearin: We join in the request, your Honor.

The Court: All witnesses who are to be called in the case with the exception of the plaintiff and one executive for the defendant will be excluded from the courtroom.

Mr. Gearin: Mr. Irvine is not an executive, but he is the only one here with us. He is a claim agent. I doubt if he will have to testify, your Honor.

The Court: In any event, all the rest of the witnesses are excluded and will remain outside the courtroom except during the time that they are called on the witness stand up until the time the Court finally submits the case to the jury by instructions. The Bailiff will enforce the order. All witnesses will now leave.

(Thereupon opening statements were made by counsel for the respective parties, the jury was excused until 1:30 o'clock p.m. of the same day, and thereafter, during the absence of the jury, the following [3] proceedings were had:)

Mr. Brobst: Your Honor, I wonder if I could take up a matter with the Court and counsel in chambers for a moment.

The Court: No. I never take up anything in chambers. You can speak to me right on the bench.

Mr. Brobst: I wanted to make this suggestion: I noticed your Honor on several occasions said that we must establish negligence to recover. Now we don't have to under the Federal Boiler Inspection Act. All we have to do is establish a violation of the Act and negligence is not involved.

The Court: Your pre-trial order does not reflect that.

Mr. Brobst: I believe it does, our Honor.

The Court: I don't think it does.

Mr. Brobst: I wanted to call attention to that because I just read a Supreme Court case in which——

The Court: I understand that perfectly. I have tried a lot of these cases, and I understand that is true, but here is the thing I am trying this case on: Was the defendant's engine improper or unsafe in any of the particulars charged and, if so, was such a proximate cause of the death of the decedent? In so far as the first issue is concerned, I will submit it on that basis. Then as to the question of negligence in the particulars charged, was that the proximate cause of the death? I don't think I have said anything counter to that. I have tried hundreds of these cases. [4]

Mr. Brobst: I just wanted to be sure. I don't want any error.

The Court: No, I don't want any error either. In addition, I will take up a couple of other matters. With regard to the argument I will say that I think it is improper argument to mention this business about the taxable features, and I also think that this idea of an adequate recovery which has been advanced, arguments that are made on that basis are likewise improper.

Mr. Brobst: I don't do that.

The Court: I will use one as a guard against the other. If you should argue on one side, I will

permit argument on the other side. I don't charge Counsel with doing that, but I have had it done in a lot of these cases, and in three or four cases I have set aside the verdict on the ground that it was improper, in my opinion.

Mr. Brobst: All that I would do in this type of case is to put in the actuarial table which shows the loss, and there it is.

The Court: I see no difficulty about that. Now about this question of how many feet it would take to stop this train, if that is in issue at all, I don't think that ought to be the subject of expert testimony at all. I think you ought to be able to agree as to how many feet it would take to stop this train, if that is in issue.

Mr. Gearin: I didn't know that that was in issue.

Mr. Brobst: It will come up as an issue.

Mr. Gearin: I will have to acquaint myself with what the facts are. The engineer will be able to testify.

The Court: In any event, I don't think that is a subject of expert testimony. Both sides should be able to agree so there can't be much question about it, in any event.

Mr. Brobst: They have all told me around four or five feet. Counsel can verify it with his men.

The Court: With a train moving at four miles an hour, I wouldn't think it would take much for counsel on both sides to establish how long it would take to stop it considering the weight that is behind it.

Mr. Gearin: We appreciate the opportunity of discussing these features before the Court without the jury being present. One thing that disturbs me is the statement made by counsel relying upon custom and practice, when there is no contention made of a violation of the custom and practice or the company rules. I think in all fairness to Counsel I should advise him that I will have to object to the introduction of any testimony regarding that because there is no issue raised by the pre-trial order in that regard.

Mr. Brobst: It comes under the heading, I thought, of the failure of the engineer to stop. We have that in there. I thought that was fully covered in the order under that heading. [6] If Counsel was misled at all, I certainly didn't mean to.

The Court: The ordinary rule of pleading is that you must plead the reference to a rule that you are relying on or give the rule that you are relying on, or you must plead custom and practice.

Mr. Brobst: The trouble is that pleadings in different jurisdictions are different.

The Court: That is the rule in California.

Mr. Brobst: You will notice our pleading there is general.

The Court: I am talking about the pre-trial order. The pre-trial order is the consolidated pleading. It doesn't say anything about it.

Mr. Brobst: I didn't know, frankly, that you had to set out the rule. I thought it was sufficient to put down that he failed to stop.

The Court: I don't think you have to set out

the rule, but I think you have to say that there is a rule that you are relying on.

Mr. Brobst: That is a custom and practice, that he failed to stop.

The Court: All right. Let's put it in the pre-trial order, then. This pre-trial order is subject to a lot of amendments already, so I think you better rewrite it during the day.

Mr. Brobst: We will do that, then. We will rewrite it. [7] I will tell Counsel what I have in mind. I don't want to mislead anybody or bring into the case anything that he is not fully aware of.

The Court: All right. We will recess until 1:30.

(Thereupon a recess was taken until 1:30 p.m., at which time Court reconvened and proceedings were resumed in the presence and hearing of the jury as follows:) [7A]

HERMAN F. BIWER

was produced as a witness in behalf of the plaintiff and, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Brobst): Mr. Biwer, what is your business or occupation, please?

A. I am a Southern Pacific Railroad brakeman.

Q. Where do you live?

A. 820 California, Klamath Falls.

Q. How long have you been employed by Southern Pacific Company?

A. Since May the 8th, 1941.

(Testimony of Herman F. Biwer.)

Q. Back on October the 6th of 1952 were you working on a work extra No. 2718?

A. Yes, sir.

Q. Where were you working?

A. I was the conductor on the extra.

Q. Who were the other members of the crew?

A. John J. Ruger was the rear brakeman and Donald Daulton was the head brakeman.

Q. Do you know who the engineer and the fireman were?

A. The engineer was Shively. I don't know his first name.

Q. And the fireman?

A. The fireman was Slaughter. I don't know his first name.

Q. Where was your work train working?

A. We were working about one mile—three-quarters of a mile to one mile west of Wocus. [8]

Q. What was the general nature of your work?

A. We were widening a cut and putting in new signals for the CTC on the main line.

Q. Were there workmen working along the tracks up there? A. Yes, sir.

Q. What type of workmen were they?

A. Welders were working on the curve west of Wocus.

Q. You were the conductor on the train that was involved in this accident which resulted in the death of Mr. Daulton? A. Yes, sir.

Q. As far as the track up there where the work

(Testimony of Herman F. Biwer.)

was being done, would you state whether or not it was on grade?

A. It was on a slight down grade and a curve.

Q. In which direction?

A. I believe where we was actually digging it was curved towards the left, facing east on the railroad directions.

Q. You mentioned east on the railroad. Is that the railroad direction or the compass direction?

A. That is the railroad direction. It is north on the compass direction.

Q. All right. Now getting down to the time that the accident happened, what was the particular move that was being made at the time the accident happened?

A. We were headed towards the Wocus siding to go into the clear. We had a train coming out of Klamath Falls and one [9] coming from Algoma towards us, and we had to be in the clear at Wocus for these trains.

Q. Of what did your train consist?

A. The engine, two K&J cars, a ditcher, and a caboose.

Q. When you say a K&J car, what kind of a car is that?

A. They are a side dump ballast car.

Q. How far did your train have to travel to get into the clear?

A. We had approximately three-quarters to one mile.

Q. How did you get into the clear? What do you

(Testimony of Herman F. Biwer.)

do when you get down to the point where you get into the clear?

A. When you get down to the switch the head brakeman lines the switch and lines you into the side track.

Q. After you go into the side track who re-lines the switch?

A. The rear brakeman re-lines the switch behind the caboose.

Q. Now as you started to move down toward where you would be in the clear, where did you ride? A. I was in the caboose.

Q. Where did Mr. Ruger ride?

A. Mr. Ruger was on the step of the caboose.

Q. Do you know where Mr. Daulton was?

A. On the footboard of the engine, on the engineer's side.

Q. Did you see him up there? A. No, sir.

Q. Where was he the last time you saw him, as you recall now? [10]

A. He was standing on the ground the last time I seen him.

Q. Then the move started on down toward the switch? A. Toward the switch.

Q. What was the first thing that made you know something unusual had occurred?

A. When we didn't get into the clear, move towards getting into the clear, right away I knew something had happened.

Q. Then did you go out and go forward?

A. Yes, sir.

(Testimony of Herman F. Biwer.)

Q. How far was the engine stopped west or south of the switch?

A. Oh, about one car length or two car lengths from the switch.

Q. When you got up there did you see Mr. Daulton? A. Yes, sir.

Q. Where was he when you got up there?

A. He was laying underneath the front trucks of the tender of the engine.

Q. How long is that engine, approximately, in feet?

A. Oh, approximately 75 or 80 feet, I would say.

Q. Did you see any of the personal effects of Mr. Daulton? A. Yes, sir.

Q. Would you just tell us where you saw those.

A. They were about three to four car lengths behind the engine from where we had stopped.

Q. Would that be behind the engine or behind where he was? [11] A. Behind where he was.

Q. What would you estimate the length of one of those cars to be?

A. Approximately 35 feet.

Q. Now, you yourself never saw, as I understand it, Mr. Daulton on the front footboard?

A. No, sir; I didn't.

Q. In your experience as a trainman—first, just describe what has been generally your work as a brakeman and conductor.

A. Well, the majority of my work as brakeman was in the Klamath Falls yard. We let the brakes

(Testimony of Herman F. Biwer.)

off the train when we get out on the road, and we let our engines in and out of the sidings.

Q. Did you have anything to do with switch work? Have you done switching?

A. Yes, sir; we do. We don't do any switch work in the Klamath Falls yard, but we do all our own switching at Alturas, and out on the road we do our own switching.

Q. How is that done? Who gives the various signals for the movements when you are switching?

A. They have three brakemen on most of them. They have what they call a swing man. He is the one that gives the signals, if possible. They give all signals on the engineer's side.

The Court: I am in a little doubt about this. Is this witness relating the method of procedure in the Klamath Falls [12] yard or some place else?

Mr. Brobst: Q. Is that procedure followed generally, whether it is in the Klamath Falls yard or out on the road?

A. It is followed out on the road as well as in the Klamath Falls yard.

Q. Now the signals are relayed to whom?

A. They are relayed—if the swing man can't see the engineer the head man takes and gives the signals to the engineer.

Q. Assume this, Mr. Biwer: That a trainman is out on the front footboard of an engine, where he is seen by the engineer, and then the man on the front footboard goes out of the vision of the engineer, is there any custom or practice relative to

(Testimony of Herman F. Biwer.)

what the engineer should do under those circumstances?

Mr. Gearin: We object to the form of the question, your Honor.

The Court: I don't think it is a proper hypothetical question.

Mr. Brobst: I didn't hear your Honor.

The Court: I don't think it is a proper hypothetical question. Objection sustained.

Mr. Brobst: Q. Mr. Biwer, is there any custom or practice relative to the conduct of an engineer or what he should do when a man from whom he is receiving signals goes out of his vision? [13]

A. Yes, sir; there is.

Q. Would you tell us what that custom and practice is.

A. It has been the practice of engineers to stop when a man giving signals disappears from sight.

Q. Now Mr. Biwer, do you have a recollection as to how fast that movement was being made at the time the accident happened?

A. Between two and four miles an hour.

Q. In your experience as a trainman, in what distance could that movement be stopped by the engineer? A. Oh, within 10 to 15 feet.

Q. Who has charge of the train in a movement of that kind?

A. The conductor jointly with the engineer.

Q. What would be the purpose of Mr. Daulton being out on the front footboard of that engine?

A. Well, piloting by the welders that was work-

(Testimony of Herman F. Biwer.)

ing there in case they didn't have their equipment off the track, and also to let him into the siding.

Mr. Gearin: I didn't hear that.

A. To pilot him by the welders and equipment that would be on the track, and also to let him into the siding.

Mr. Brobst: Q. Did you yourself examine the footboard after the accident, Mr. Biwer?

A. No, sir; I didn't.

Mr. Brobst: I have no further questions. [14]

Cross Examination

Q. (By Mr. Gearin): Mr. Biwer, you have never operated an engine, have you?

A. No, sir.

Q. You have never made any tests or experiments in connection with the stopping distance of trains?

A. I have with cars; yes, sir.

Q. But as to cars such as you had here, K & J cars, ditchers, spreaders, caboose, engine and tender?

A. No, sir; I haven't.

Q. All right. Now, as the engine approached the siding there was a signal there, was there not, and a switch?

A. There was a block signal there; yes, sir.

Q. And the duty of the engineer is to watch the block signal?

A. Not necessarily, sir.

Q. As the engine would come up to the siding the brakeman would line the switch; that is, the

(Testimony of Herman F. Biwer.)

switch that was there so that the train could go into the siding? A. Yes, sir.

Q. All right. Wouldn't the brakeman have to signal the engineer that they were approaching the siding or the switch?

A. No, sir. He would have the block signal to go by.

Q. What personal effects did you find of the deceased?

A. I didn't find them. I seen a pencil and notebook and money scattered along the right-of-way.

Q. For how long a distance in feet?

A. Oh, I would say approximately between a hundred and hundred and fifty feet.

Q. Would you say that this move that you made at the time the deceased lost his life was made according to your regular custom and practice?

A. Yes, sir.

Q. The last time you saw Mr. Daulton what was his physical appearance?

A. Fine. He felt good. We just had lunch at Klamath Falls, and we had been back at work and he felt good. He was full of pep.

Q. His usual self? A. Yes, sir.

Q. Now, these welders that you mentioned, they were a good thousand feet or so away from the accident, were they not?

A. Yes, sir. They were 75 cars away from the accident.

Q. You were on the main line?

A. Yes, sir.

(Testimony of Herman F. Biwer.)

Q. You were not backing the engine?

A. No, sir.

Q. You were not backing cars?

A. No, sir.

Q. Were you shoving cars ahead of the engine?

A. No, sir. [16]

Q. I take it—I know you will correct me if I am wrong—as you were approaching the siding the train was going forward, and there was the engine, the engine tender, two K & J cars, a ditcher, a spreader—do you remember the spreader?

A. Yes.

Q. And then the caboose?

A. Behind the engine and tender there was a K&J car, then a ditcher, then a K&J, then the spreader, and the caboose.

Q. And you were in the caboose?

A. Yes, sir.

Q. Do you know of your own personal knowledge where Mr. Daulton was at the time of the accident? A. No, sir.

Mr. Gearin: I wonder, Mr. Kenyon, if I might have Exhibit No. 1, which is a sealed exhibit for impeachment purposes only.

Q. Mr. Biwer, through the courtesy of the Marshal, I would like to hand you a document marked Exhibit No. 1, which is a sealed exhibit. I will ask you if you can identify that document, and I will ask you if your name and signature appears any place thereon. A. Yes, sir.

Q. Referring to page 6, I will ask you if your

(Testimony of Herman F. Biwer.)

name appears thereon, and in how many places.

A. Once. [17]

Q. Did you sign it somewhere in the middle of the page, Mr. Biwer?

A. That is the only place I signed it, was in the middle of the page.

Q. All right, sir. Do you recall giving that statement to Mr. Irvine, who sits here behind me?

A. Yes, sir.

Q. On October 7, 1952? A. Yes, sir.

Q. You signed that statement freely and voluntarily, did you? A. Yes, sir.

Q. And that statement contains the version of the accident as you gave it to Mr. Irvine the day following the accident? A. Yes, sir.

Q. Is that a true statement of what occurred?

A. It was what I thought occurred; yes, sir.

Mr. Gearin: I will ask that that be marked as Exhibit 1-A, your Honor, and that it be received in evidence, being offered solely for the purpose of impeachment.

Mr. Brobst: I have no objection, your Honor.

The Court: Admitted.

(The statement referred to was received in evidence as Defendant's Exhibit 1-A.)

Mr. Gearin: Mr. Brobst, will you stipulate with me that [18] the exhibit which was just received may be read to the jury at any time?

Mr. Brobst: Yes, that is all right. Will you stipulate also that is in the handwriting of Mr. Irvine and not Mr. Biwer?

(Testimony of Herman F. Biwer.)

Mr. Gearin: That is correct.

Q. Now this custom of the engineer to stop, Mr. Biwer, that is embodied in Rule 7-B of the rules and regulations of the Transportation Department, is it not? A. Yes, sir.

Q. To refresh your memory, so we are talking about the same thing, that rule provides as follows, does it not: "In backing an engine or cars, or shoving cars ahead of an engine, the disappearance from view of a trainmen or lights by which signals controlling the movement are being given, must be construed as a stop signal." That is the custom and practice to which you referred, is it not?

A. No, sir. That is part of it. It has just been a past practice whenever a brakeman or his light disappears from sight the engineer will stop.

Q. There is no rule on that, to your knowledge?

A. No, sir; not to my knowledge.

Mr. Gearin: I think that is all. [19]

Redirect Examination

Q. (By Mr. Brobst): Mr. Biwer, did you have occasion to watch Mr. Daulton in his work?

A. Yes, sir.

Q. How did he perform his work as far as agility was concerned?

A. As far as I know, he performed it in a safe manner, what he has done all the times I have worked with him before.

Q. How about his ability to get around on cars, and things like that?

(Testimony of Herman F. Biwer.)

A. It was very good, sir.

Mr. Brobst: That is all.

(Witness excused.) [20]

GERALD E. RUTLEDGE

was produced as a witness in behalf of the Plaintiff and, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Brobst): Mr. Rutledge, what is your business or occupation, please?

A. I am employed by the Southern Pacific Railroad as a brakeman and conductor.

Q. How long have you been employed by the Southern Pacific Company?

A. 15 years in that capacity.

Q. In your experience as a conductor and brakeman in what kind of work have you been engaged? Just generally describe it.

A. Primarily freight work, with a big proportion of the time on local freight.

Q. What does that involve?

A. Switching and handling of cars, switching industry tracks, spotting cars, and doing maintenance-of-way work.

Q. In that connection do you have anything to do with the stopping of trains and train movements? A. Yes.

Q. How is that done?

A. The movement of trains, generally speaking,

(Testimony of Gerald E. Rutledge.)

is by signals, hand signals or lamp signals; sometimes by verbal instruction. [21]

Q. When signals are given who are the signals given to, or to whom are they relayed?

A. For the movement of a train or an engine they are given to the engineer generally.

Q. Most of your experience of 15 years has been in this vicinity, has it? A. Yes.

Q. That is around Klamath Falls?

A. Yes.

Q. Mr. Rutledge, is there any custom or practice with reference to the conduct of an engineer when one of the trainmen is in his view giving signals and when that trainman disappears from view? Is there any custom or practice relating to the conduct of the engineer?

A. Yes, there is a practice.

Q. What is that, please?

A. In switching, for example—I would have to give an example. In switching, where you can be seen by the engineer, the man immediately ahead of the engine or behind the engine, or closest to the engineer, gives the signal to proceed and stop and directs the movement of the engine. If that man who normally gives signals to direct the engine gets out of sight, there is no direction, no further direction for the engine, and it must stop. That is the practice.

Q. Now, in a move where a cut of cars or a train is being [22] moved some 75 car lengths or three-quarters of a mile to a mile to get in the

(Testimony of Gerald E. Rutledge.)

clear, what is the purpose or what would be the purpose of one of the trainmen riding on the front footboard of the engine for that distance?

A. There could be several purposes. I think that the circumstances directly involved in that particular movement would have to be known before you could determine the purpose.

Q. Well, if he rode out there would you state whether or not that was for some particular purpose?

Mr. Gearin: If he knows.

A. I would have to presume.

Mr. Brobst: Q. Let's put it another way. He is the head brakeman. Where does the head brakeman normally ride in a move of that kind?

A. In the cab of the engine I think would be the general place for him to ride.

Q. And if he doesn't ride in the cab of the engine who has authority to place him any other place?

A. The conductor or the engineer, or possibly both of them, by general understanding.

Q. Would you tell us who it is that stations the men on the train?

A. I am not quite sure of the question.

Q. Who stations the men, tells them where to be on the train as the movement is being made? [23]

A. The conductor.

Q. Now, Mr. Rutledge, did you have occasion to go down and look at this engine No. 2718 following October the 6th of 1952?

Mr. Gearin: Just a moment. We are going to

(Testimony of Gerald E. Rutledge.)

object to this on this ground and for this reason: There appears in the files and records of this case an interrogatory directed to the plaintiff and to her attorney to furnish the defendant with names and addresses of all persons having any knowledge of any material fact in connection with the death of Mr. Daulton. That interrogatory was never answered by plaintiff upon Mr. Brobst's representation to me that only certain individuals would be called, as they were the only ones that had any knowledge of the accident, and Mr. Rutledge's name was not furnished to me. I hate to be technical about this, but I think under the circumstances I have a right to make known our position.

Mr. Brobst: I am sorry, but it was an oversight if it was not furnished. If I didn't notify you, I will certainly not press it now.

The Court: There seems to be nothing before the Court.

Mr. Brobst: I might state this, your Honor. I interpreted the request as being for witnesses who were not employes of the company. That is the way I interpreted it. I may have been wrong. [24]

The Court: At least, I am not going to pass on it. Go ahead. Settle it among yourselves.

Mr. Brobst: Q. Now, when you are coming up to line a switch, Mr. Rutledge, where normally does the engine stop?

A. As close to the switch as possible—before reaching the switch, I should say.

Q. When does the trainman get off to line a

(Testimony of Gerald E. Rutledge.)

switch? I don't know if I can make it any clearer without leading a bit, and I don't want to do that. When does he get off?

A. As soon as the engine has come to a stop.

Q. In other words, he doesn't get off until the engine has stopped?

A. As a general practice, no.

Q. Did you know Mr. Daulton in his lifetime?

A. Yes, I did.

Q. Had you observed him in his work?

A. Yes, I have.

Q. Would you tell us how he was with reference to getting on and off moving cars and climbing around on cars, if you observed him doing that?

A. I think that he was probably as agile a man as there was working there. His general habits and movements were all very athletic; never any stumbling, never clumsy, about any of his movements.

Mr. Brobst: I think that is all. [25]

Cross Examination

Q. (By Mr. Gearin): Mr. Rutledge, if the head brakeman were in the cab of the locomotive the engineer would know where to stop in daylight as he approached a switch, would he not?

A. I would say that the engineer should see the switch in daylight, yes.

Q. Yes. He would know where to stop and he wouldn't necessarily depend or have to depend upon signals from the head brakeman?

(Testimony of Gerald E. Rutledge.)

A. He wouldn't necessarily have to depend on those signals.

Q. Right. Sometimes brakemen ride on the footboard when there is no necessity of their riding there; isn't that a fact?

A. I can only say that I wouldn't ride the footboard of an engine unless there was a desperate necessity for me to be there.

Q. The question is sometimes brakemen do it, don't they?

A. I think probably when they think there is a necessity, yes.

The Court: That answer is stricken. Answer the question.

Mr. Gearin: Read the question.

(Last question read.)

A. I can't say that they do. The answer would be no.

Q. One other question. This custom and practice that you talked about, that Mr. Brobst asked you about, you gave an [26] answer with reference to switching. That applies to switching or when you are shoving cars or pulling cars, or where there are cars ahead of the engineer you have to have someone out to act as the eyes of the engineer; is that correct?

A. That is the rule that you are speaking of. Custom and practice is one of those things—it is a positive assurance against a man falling when he is out of sight. When he is in sight, he can give

(Testimony of Gerald E. Rutledge.)

signals. When he is out of sight no one can know what kind of signals he might be giving. That is the custom and practice.

Q. You mean when there is a necessity for the brakeman to give signals Is that a fair statement, Mr. Rutledge? I will restate the question. The custom, usage, and practice to which you refer applies when a brakeman has to be out someplace to give a signal, doesn't it?

A. We are still talking about two things, I believe. The custom and practice would apply under any circumstances. The rule is what you allude to when you are shoving cars or around curves, and so forth. That is the rule.

Q. Is it your testimony, then, that the custom applies to all circumstances and to any brakeman at all, when he goes out of sight you stop?

A. When he is the man that is directing the movement.

Q. Then the custom and practice to which you refer applies to situations where the brakeman is directing the movement? [27]

A. Directing the movement or is preparing to direct a movement, preparing himself or getting in a position to direct a movement.

Q. Or to give a signal? A. Correct.

Q. If there is no necessity for the brakeman to direct the movement or give a signal, would you say that the custom and practice still obtains?

A. I think the crew as a whole look out for each other. The engineer would certainly watch any man,

(Testimony of Gerald E. Rutledge.)

whether he was directing the movement or whether he was just riding——

Mr. Gearin: Mr. Beckwith, will you read the question to the witness, please.

(Last question read.)

A. Yes.

Q. Can you answer that? A. Yes.

Mr. Gearin: I have no further questions.

Mr. Brobst: No further questions.

(Witness excused.) [28]

JOHN RUGER

was produced as a witness in behalf of Plaintiff and, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Brobst): Mr. Ruger, what is your business or occupation, please?

A. Brakeman for Southern Pacific.

Q. How long have you been employed by the Southern Pacific? A. 14 and a half years.

Q. So we will not waste any time, you were, I believe, the rear brakeman on this work train in the move that was being made at the time that Mr. Daulton was killed; is that correct?

A. I was.

Q. During that move where were you stationed?

A. I was standing on the lower step of the back of the caboose watching ahead. It was hot inside, so I stayed outside.

(Testimony of John Ruger.)

Q. You were standing outside? A. Yes.

Q. On which side would that be?

A. On the engineer's side.

Q. Were you on the step or down on the stirrup?

A. No, the lower step. I was on the lower step.

Q. As you rode along there could you see Mr. Daulton? A. Yes, all the time.

Q. About how far was the move that you were going to make? [29] For what distance were you going to move?

A. Oh, from 60 cars to 70 cars to get to the switch.

Q. Whose job was it to line the switch when you got up there? A. It was the head brakeman.

Q. That was Mr. Daulton?

A. Mr. Daulton.

Q. Where there any workmen along the track that you passed on the way down?

A. Well, a couple of fellows. I figured they were welders. They were not working at the time. They were standing off to the side.

Q. As you went down there what would you say would be the speed of the movement of the train at the time the accident happened, your best judgment on it?

A. Pretty slow; probably three or four miles, because we do that going into a switch. They don't try to go in there fast.

Q. As you were watching Mr. Daulton did he disappear from your view at any time?

(Testimony of John Ruger.)

A. Well, not until he got close to the switch. Then I must have looked someplace else. When I looked again he wasn't there, so I just automatically thought he was getting the switch.

Q. How long was that before the train stopped, that Mr. Daulton disappeared from your view? It would be about how [30] many car lengths or what distance, if you can remember?

A. Oh, three or four or five car lengths, maybe.

Q. Then it traveled along after that until it came to a stop; is that correct?

A. It wasn't very far. It is pretty hard to remember just how it was, but we were close to the block signal.

Q. Your best recollection is three or four or five car lengths? A. Yes.

Q. Now, Mr. Ruger, after the accident did you go up to the front of the engine at all?

A. No, I just—when the engineer motioned for me to come up I went up and took a look, and then I took off. I had to flag—there was a train due behind us, and I had to flag it right away, so I didn't go to the head end of the engine at all; just as far as the steps leading up to the cab.

Q. Then did you at a later time during the day look at the step in front of the engine?

A. Well, we was around that side for about two hours, and I was walking back and forth, but I never looked specifically at it because I didn't know what I was looking for. I was all over the train.

Q. Did you make any observations at all about

(Testimony of John Ruger.)

two hours later while you were there in the cut with reference to the right front footboard?

Mr. Gearin: We object, your Honor, on the ground and for [31] the reason the witness has already testified he didn't look specifically at the front of the engine.

The Court: Overruled.

A. Well, no, I didn't. I knew that there was one new one and one old one, there was one new board and one old one.

Mr. Brobst: Q. Did you observe anything with reference to the way that either one of them was fastened to the brackets?

A. No, I didn't at the time.

Q. Did you look at it?

A. Well, it was found afterwards——

The Court: Just a moment. Tell what you saw; not something else. You started off, "It was found." I don't know what that means.

Mr. Brobst: Q. All we want is what you actually saw. Did you actually look at it at a later date? A. At a later date, yes.

Q. When was it that you actually looked at it? When was it that you say later you looked at it?

A. Well, it wasn't more than two days.

Q. Can you state whether or not it was the same board that you saw a couple of days later that was on the front of the engine at the time the accident happened?

A. No, I couldn't tell. I don't pay very much attention to those things.

(Testimony of John Ruger.)

Q. When you saw it two or three days later what did you see [32] with reference to the bolts, if anything?

Mr. Gearin: An objection, your Honor, on the ground the witness has testified he couldn't even say if it was the same board. There is no testimony it was in the same condition as it was at the time of the fatal accident.

The Court: Overruled.

A. I don't know. I don't even notice those things. I work around them and I just never gave it a thought.

Mr. Brobst: Q. Mr. Ruger, did you do anything when Mr. Daulton went out of view of you, when you lost sight of him?

A. No, I didn't do anything. I didn't make any motion. I just saw he was gone. It was a common everyday occurrence, and I just waited for the block signals to change, and it didn't, and then I knew something was haywire.

Mr. Brobst: I have no further questions.

Cross Examination

Q. (By Mr. Gearin): Mr. Ruger, you were riding on the step of the caboose? A. Yes.

Q. The train was going ahead this distance and was going to stop at the switch at Wocus siding?

A. Yes.

Q. What necessity was there for you riding on the step and not inside the caboose? [33]

A. Well, when you are sliding into a siding the

(Testimony of John Ruger.)

rear man is responsible for lining up that switch. There was a slight curve, and I was just watching for the block signal to go red. I knew we were going in, and then I would get the switch behind.

Q. You would get the switch after the train had gone into the siding? A. Yes.

Q. Would you say the train came up very close to the siding when it stopped? A. Yes.

Q. You believed, then, after it stopped that the head brakeman would get off and go and line the switch?

A. Yes. It should have went red, but it didn't.

Q. Well, as you got near the crossing or the switch you looked someplace else, and then you looked back and Mr. Daulton was out of sight?

A. Yes.

Q. You didn't attach any particular significance then, did you, to the fact that Mr. Daulton went out of sight because you were so close to the switch; is that correct?

A. That was just usual, that he would be out of sight crossing over to get the switch.

Mr. Gearin: No further questions.

Mr. Brobst: I have no further questions.

(Witness excused.) [34]

EDWARD TEANEY

was produced as a witness in behalf of the plaintiff and, having been first duly sworn, was examined and testified as follows:

(Testimony of Edward Teaney.)

Direct Examination

Q. (By Mr. Brobst): Mr. Teaney, what is your business or occupation, please?

A. I am a switchman for the Southern Pacific.

Q. How long have you been employed by Southern Pacific? A. Since October the 4th, 1941.

Q. Where were you working back on October the 6th of 1952? A. Here in Klamath Falls.

Q. On that date did you learn that Mr. Daulton had been killed? A. I did.

Q. About what time did you hear that, if you can recall?

A. Well, it seems to me it was around 4:00 to 5:00 o'clock.

Q. Were you on duty at the time? A. No.

Q. When you heard that did you come on down to the yards then?

A. Yes, I did, very shortly.

Q. When you got down to the yards did you see the engine that was involved in the accident?

A. The engine?

Q. Yes. [35]

A. Not at that time; no, sir.

Q. When did you see the engine that was involved in the accident? A. The next morning.

Q. What time was that?

A. Oh, approximately 9:00 o'clock.

Q. Who was with you, if anyone?

A. Mr. Zimmerman was with me.

Q. At that time did you examine the footboard on the engine? A. I did.

(Testimony of Edward Teaney.)

Q. Will you just tell us what you saw.

Mr. Gearin: We object, your Honor, on the ground and for the reason it is not shown that the condition as Mr. Teaney saw it the next morning was the same or similar to the conditions as they existed at the time of the accident.

The Court: Overruled.

A. Well, we went down to the roundhouse——

The Court: You were not asked what somebody else saw. What did you see?

A. I went down to the roundhouse and found this engine in the roundhouse, and the footboards had protruding bolts on them.

Mr. Brobst: Q. Which footboard was that, the right or left? A. The right one. [36]

Q. How much did it protrude? Just describe what you saw.

A. Well, it was sticking up, I would say, approximately three-eighths of an inch above the level of the board.

Mr. Brobst: I appreciate the fact that these pictures were taken about a year later, but this Plaintiff's Exhibit B, I will ask that you show that to the witness.

Q. Now, Mr. Teaney, looking at that picture, I will ask you this: Is that picture a correct representation of the appearance of that board on the morning that you saw it?

Mr. Gearin: We object to the form of the question.

(Testimony of Edward Teaney.)

The Court: That doesn't give me much of an idea——

Mr. Gearin: It is leading, your Honor. I submit it is leading.

The Court: Sustained.

Mr. Brobst: Q. Mr. Teaney, what does that picture show? A. It shows a bolt sticking up.

Q. Would you state whether or not that bolt sticking up is the same as you observed on the morning that you saw the footboard of that engine down in the roundhouse?

A. I would say it is.

Q. What about the other bolts shown in the picture? A. What do you mean?

Q. Would you just describe how they are set in there, in the running board?

A. Well, they are countersunk. They are not all the way down. [37]

Q. Is that the way they appeared when you saw it the morning that you saw the footboard?

A. Yes.

Mr. Brobst: I will ask, your Honor, that that picture be admitted into evidence as a plaintiff's exhibit.

Mr. Gearin: Same objection, your Honor, it being my position it is not shown that was the footboard that was on the engine at the time of the accident, or that it was similar or had any similarity whatsoever to the one that was on at the time of the accident.

The Court: Oh, that is a different matter. You

(Testimony of Edward Teaney.)

didn't think that objection before. I think it is a proper objection to the introduction of the picture. I think the time and place has to be shown, and whether it was a picture of an object which has any connection with the case. Objection sustained.

Mr. Brobst: Q. You were not present when the picture was taken, were you? A. No, sir.

Q. You don't know when it was taken?

A. No.

Q. Is there any similarity between the footboard as shown in the picture and the footboard that you saw the morning after the accident happened?

A. This picture here? [38]

Q. Is there any similarity between them?

A. Yes.

Q. Will you just tell us what that similarity is.

A. Well, those bolts were protruding just like in this picture, and I would say approximately the same distance as shown here. Also it was very grimy.

Mr. Brobst: May I make another offer of the picture, your Honor?

Mr. Gearin: I would like to see it again, if I may, your Honor. We have a further objection, your Honor, that it is not shown this is a picture of the locomotive that was involved in the accident. I think Mr. Brobst will agree with me that this picture was taken in December of 1953.

Mr. Brobst: That is correct. There is no question about that.

The Court: Objection sustained.

(Testimony of Edward Teaney.)

Mr. Brobst: Q. Mr. Zimmerman was with you at the time that you saw this board?

A. Yes, he was.

Q. Did you say what the time was the next day that you saw it?

A. Approximately 9:00 o'clock.

Q. What was the condition of the footboard on the other side of the engine?

A. The condition of the footboard on the opposite side? [39]

Q. Yes.

A. Well, I don't remember distinctly.

Q. Was it in the same condition as the one was in on the right-hand side? A. No.

Q. What was the difference?

A. Well, I don't remember it being in as bad a shape as the one was. That is all the difference I remember right now.

Mr. Brobst: I have no further questions.

Cross Examination

Q. (By Mr. Gearin): Mr. Teaney, you are the brother of the plaintiff in this case, are you not?

A. Yes, sir.

Q. You went down to see that footboard about 9:00 or 10:00 o'clock the next morning; is that about right? A. Yes.

Mr. Gearin: I have no further questions.

Mr. Brobst: That is all.

(Witness excused.) [40]

ROBERT B. ZIMMERMAN

was produced as a witness in behalf of Plaintiff and, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Brobst): Mr. Zimmerman, what is your business or occupation, please?

A. I am a switchman for the Southern Pacific Company.

Q. How long have you been employed by the Southern Pacific Company? A. 18 years.

Q. Mr. Zimmerman, did you have occasion to go down and look at Engine No. 2718, I believe it was, the morning of October 7, 1952?

A. Yes, sir.

Q. Who was with you?

A. Mr. E. C. Teaney.

Q. How did you happen to go down and look at the footboard on the engine?

A. I am the local chairman of the Brotherhood of Railroad Trainmen, and Mr. Teaney called me and asked me to accompany him to inspect the engine.

Q. When you got down there, just tell us what you saw with reference to the front footboards on Engine 2718.

Mr. Gearin:: The same objection, your Honor, for the purpose of the record. [41]

The Court: Overruled.

A. The front footboard on the engineer's side—that would be the right footboard—the bolts were

(Testimony of Robert B. Zimmerman.)

not completely countersunk, and there was a bolt approximately in the center of the footboard that was sticking upward about three-eighths or a quarter of an inch.

Q. What was the condition of the board generally with reference to any foreign material or anything else that might have been on it?

Mr. Gearin: We object to that, your Honor, on the ground and for the reason there is no charge made there was any foreign material on the footboard. The only charge is that contained in the pre-trial order——

Mr. Brobst: Your Honor, I am not using it for the purpose of—it is just to show that it was a used board as distinguished from a new one.

Mr. Gearin: We object to that on the ground of immateriality, then.

The Court: He may describe the condition of the board. The question is rejected as leading.

Mr. Brobst: Q. Would you describe the board, Mr. Zimmerman, with reference to being old or new.

The Court: Just a moment. Strike that question. Just tell the condition of the board as he saw it without any suggestion from counsel as to what it might be. Go ahead. [42]

A. The board was dirty. I mean it showed evidence of being well-worn. The only thing wrong with it that I saw was the bolts, and it showed evidence of being in use for some time.

Q. How about the running board on the other side, on the fireman's side?

(Testimony of Robert B. Zimmerman.)

A. Do you mean the footboard?

Q. Yes, the footboard.

A. The footboard, as I recall, on the fireman's side was fairly new.

Q. Now, Mr. Zimmerman, has most of your experience been around here in this area?

A. Yes, sir.

Q. What types of work have you done generally?

A. Helper on switch crews and engine foreman, and two months as a brakeman.

Q. In your experience in working around engines, would you tell us in what distance the movement of an engine with, I believe it is, four cars, two K&J cars, a ditcher, and caboose, traveling at from two to four miles an hour, could be stopped?

Mr. Gearin: We object, your Honor, on the ground that the witness is not qualified, and on the further ground that the premise of the question is wrong because there were more cars than that. Furthermore, it was not shown whether the cars were empty or loaded. Also, the man is not shown to have any experience on that subject. [43]

The Court: I think that is correct. I don't think he has had any experience to qualify him to answer.

Mr. Brobst: Q. Mr. Zimmerman, assuming empty cars—I don't have the exact consist of it, but I believe there were two K&J cars, a ditcher, caboose, and a spreader. The K&J cars were empty, and the ditcher and the other one I don't believe carried a load. Assuming that condition—I will ask

(Testimony of Robert B. Zimmerman.)

this preliminary question: Do you know the track out at Wocus, in the vicinity of where this accident occurred? A. Yes, sir.

Q. Are you familiar with the grades there?

A. Yes, sir.

Q. Assuming that the move is being made, then, in a northerly direction or railroad direction east, traveling at between two and four miles an hour, in what distance could that movement be stopped on a stop signal?

A. It could be stopped within a few feet, almost immediately.

Mr. Gearin: Just a moment, please. We object, your Honor. The witness is not shown to be qualified.

The Court: He has worked around trains. It is a question for the jury. Ladies and gentlemen of the jury, I think that this witness has shown no particular qualifications, any more than you and I would have about this, but he has seen trains in operation, perhaps, and under those circumstances I will permit him to answer. But you should take into consideration [44] his statement about his experience.

Mr. Brobst: Q. In what distance?

A. He could stop within a few feet, or almost immediately.

Q. Now, Mr. Zimmerman, is there any custom or practice relative to what an engineer should do when one of the trainmen that is in his vision dis-

(Testimony of Robert B. Zimmerman.)

appears from view? Is there any custom and practice as to what the engineer should do?

A. Yes, sir. He should stop.

Q. How long have you worked in this part of the country?

A. Practically all my experience has been at Klamath Falls, with the possible exception of about six months.

Q. That is, in all types of train movements?

A. Yes, sir.

Q. Assuming that there is this work train that consisted of a number of cars that have been described to you, and they are ordered to make a move to get into the clear, in your experience what would be the purpose of the brakeman riding out on the front footboard of the engine for that distance of a mile to three-quarters of a mile?

A. He would be directing the movement up to the switch point.

Q. Mr. Zimmerman, assuming that he had no duties such as that, where would he normally ride?

A. In the cab of the engine.

Q. Who has control of the position of the men on a train when a move of that kind is being made?

A. Well, the engineer would have up on the head end.

Mr. Brobst: I have no further questions.

Cross Examination

Q. (By Mr. Gearin): Mr. Zimmerman, you say that the brakeman, assuming he was out there,

(Testimony of Robert B. Zimmerman.)

would be directing the movement, according to your testimony? A. Yes, sir.

Q. Would that be the only purpose of his being out there?

A. Well, I can't think of any particular purpose for him to be riding out there unless he was up there to give signals.

Q. What signals would be give?

A. Stop signals and come-ahead signs.

Q. His purpose would be to line the switch at the siding? A. That is right.

Q. If he were in the cab of the locomotive, the locomotive would go up to the switch, stop, and he would get down and line the switch and the train would proceed into the siding?

A. That is right.

Q. Then if he were riding in the cab of the engine there would be no necessity for him either to give a signal or to direct the movement, would there?

A. Not if he was in the cab of the engine.

Q. No. We are assuming now a condition of daylight, and the block signal and switch the engineer can see from the [46] cab, can't he, and he knows when he is coming to the siding, doesn't he?

A. Yes.

Mr. Gearin: That is all.

Mr. Brobst: That is all.

(Witness excused.)

TED T. WILLIAMS

was produced as a witness in behalf of Plaintiff and, having bein first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Brobst): Mr. Williams, what is your business or occupation, please?

A. Conductor and brakeman for the Southern Pacific Company.

Q. How long have you worked as conductor and brakeman for the Southern Pacific Company?

A. Brakeman since January, 1937, and conductor since May, 1945.

Q. Where principally have you been employed, in what division? A. The Shasta Division.

Q. What does that include?

A. Includes between Gerber and Crescent Lake.

Q. In your work what type of work have you done? Would you just describe it generally, and what that includes, both as brakeman and as conductor?

A. I have held an assignment as brakeman at present between Klamath Falls and Crescent Lake, and I have held various jobs as conductor for a short period of time.

Q. When you are in the yard and on the road what do you do with reference to your train if you are acting as a brakeman?

A. Well, you have to watch out for signals, take care of any switching movements that might come up. [48]

(Testimony of Ted T. Williams.)

Q. Whom do you give signals to, if anyone, in such movements?

A. Well, you give them to the engineer or another brakeman to pass on to the engineer, or another member of the crew.

Q. How about when trains are going to be stopped or coupled, who gives those signals?

A. Well, either the brakeman or sometimes the conductor.

Q. Have you had occasion to stop trains and stop the movement of trains? A. Yes, sir.

Q. On how many occasions?

A. Oh, on numerous occasions. I couldn't mention the amount.

Q. Is there any custom or practice, Mr. Williams, with reference to what an engineer should do when a trainman is in his view and the trainman disappears and he is riding on the train that the engineer is operating?

A. Oh, he should stop immediately.

Q. Are you familiar with this section of track out here by Wocus where this accident occurred?

A. Yes, sir.

Q. How many times have you been over it?

A. Oh, I would say on the average 40 times a month.

Q. Now, assuming a train out there consisting of an engine, two K&J cars, a ditcher, a spreader, and a caboose, traveling north or railroad east, at a speed of between two and four miles an hour, in what distance could that be stopped? [49]

(Testimony of Ted T. Williams.)

A. Well, it should be able to stop——

Mr. Gearin: The same objection, your Honor.

The Court: No, I think that this witness has indicated that he has had sufficient experience.

A. It should be able to stop in between four to six feet at three miles an hour, if the equipment is in first-class shape.

Mr. Brobst: Q. Now, Mr. Williams, did you ever examine the front footboards on Engine 2718?

A. Yes, sir; I did.

Q. When was it that you looked at them?

A. It was approximately a week after the accident.

Q. Where was the engine at that time?

A. It was parked next to the roundhouse, by the steam rack.

Q. Was anyone with you when you examined the footboards?

A. No, sir; there wasn't.

Q. Will you just tell us what you saw when you examined the footboard. Just describe everything that you saw.

Mr. Gearin: An objection, your Honor, as too remote.

The Court: When was this?

Mr. Gearin: A week later, he said.

The Court: I will permit the answer, and then we will see.

A. On the fireman's side of the engine apparently the footboard had been replaced. On the engineer's side, in about the center of the footboard,

(Testimony of Ted T. Williams.)

there was a bolt protruding—I [50] couldn't say what distance, but it was on the top of the footboard.

Mr. Brobst: Q. Anything else you observed about the board?

A. No, although it was greasy, and had a good deal more grease on it than the one on the other side, on the fireman's side.

Mr. Brobst: I wonder if I could show this witness Plaintiff's Exhibit B.

Q. Mr. Williams, I appreciate the fact that that picture was taken about a year after the accident, but I will ask you if you can recognize that. What does it represent as far as you can see there?

A. Well, the head of the bolt on this footboard is protruding beyond the footboard.

Q. Does it look like or is it a fair representation of what you saw out there when you examined No. 2718 back in October of 1952?

Mr. Gearin: Objected to as leading, your Honor.

The Court: Sustained.

Mr. Brobst: Q. Is there any similarity between that picture and what you saw back in October of 1952?

A. I would say there was a similarity, yes.

Q. Is it a fair representation of what you saw?

Mr. Gearin: Objected to as leading. [51]

The Court: Sustained.

Mr. Brobst: Q. Is there anything in that picture that is different from what you saw back on October 6, 1952?

(Testimony of Ted T. Williams.)

A. No, I can't say that there is.

Mr. Brobst: I would like to offer the picture in evidence, your Honor.

The Court: You can't bring a picture in on that kind of evidence, counsel. The picture has to stand on its own merits, and it has to be determined whether or not it was a picture of what the conditions were at the time it was taken.

Mr. Brobst: Q. Can you recognize what that is a picture of?

A. That is a picture of a hog, what we call a hog engine, of the same class as the 2700 class.

Mr. Brobst: That is all. I can bring the man who took it. I have no further questions at this time.

Cross Examination

Q. (By Mr. Gearin): Mr. Williams, you are what they call a griever?

A. No, sir; no more.

Q. You have been?

A. I have been; yes, sir.

Q. All right. You say it is the duty of the brakeman to give signals or the conductor to give signals to stop?

A. Under certain circumstances, yes.

Q. Assuming these facts, that in daylight there is going to [52] be a switching movement into a siding and the switch and the signal are in plain sight, what necessity is there for the conductor or the brakeman to tell the engineer where to stop with reference to the switch?

(Testimony of Ted T. Williams.)

A. There is none.

Mr. Gearin: I have no further questions.

(Witness excused.)

(Short recess.) [53]

AUSTIN RICHARD HAYDEN

was produced as a witness in behalf of Plaintiff and, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Brobst): Mr. Hayden, what is your business or occupation, please?

A. Yard man, Southern Pacific Company.

Q. How long have you been employed by the Southern Pacific Company?

A. A little over 18 years.

Q. And where principally do you perform your duties?

A. Here in the Klamath Falls yard.

Q. What is the general nature of your duties?

A. Making and breaking up the trains and spotting industry cars.

Q. Do you have anything to do with the starting and stopping of trains? A. Yes.

Q. How often do you do that in the course of a day?

A. Maybe 200 to 300 times a day.

Q. Mr. Hayden, are you familiar with the track out by Wocus where this accident happened?

(Testimony of Austin Richard Hayden.)

A. Not too familiar. That is outside the yard.

Q. Your work is mostly in the yard; is that correct? A. In the yard. [54]

Q. What generally do you do as far as trains are concerned?

A. We switch trains. Maybe a 100-car train comes in here and we segregate the boxcars from one track to another.

Q. Did you have occasion to examine the footboard on Engine 2718 following the happening of the accident in which Mr. Daulton met his death?

A. Yes, I did.

Q. When was it that you examined the footboard on that engine?

A. As nearly as I can remember, it was two or three or four days after the accident.

Q. What was the occasion for your going down there and examining the footboards?

A. I am an officer in the Brotherhood of Railroad Trainmen, and Mr. Teaney was a member of our lodge, and he asked me if I wouldn't go down and look.

Q. When you examined the footboards on 2718 will you tell us what you saw.

Mr. Gearin: We object, your Honor, on the same ground, as being too remote.

The Court: Overruled.

A. Right in the middle of the right front footboard was a bolt that came up through the footboard, and it was protruding above the level of the wooden part, oh, maybe a quarter of an inch. I

(Testimony of Austin Richard Hayden.)

didn't measure it. And then over on the end where [55] the two bolts tie onto the angle bar that holds the wooden part of the footboard, they were not completely countersunk.

Q. How were they with reference to the board surface of the footboard?

A. Well, the one in the middle was up much higher than the ones over on the end. The one in the middle of the footboard was sticking up—well, where the flange on the bolt was it was above the wooden part.

Q. Now, in making switching movements around the yard here at Klamath Falls how far do you have occasion to travel on trains in making your movements?

A. It varies from day to day. Some days we do considerable traveling, and some days we are on what we call the lead, and we won't go a very great distance at all; maybe just in an area of a half a mile, and back and forth. And other times, why, we go clear out to what we call Chelsea, which I am just roughly guessing is maybe three or four miles.

Q. Now in making your moves like that are there any occasions when a brakeman rides on the footboard of the engine in making moves around the yard?

Mr. Gearin: We object, your Honor, on the ground and for the reason that Mr. Hayden's activities have been confined as a yard man to the yard. It would be entirely immaterial and incompetent. [56]

(Testimony of Austin Richard Hayden.)

The Court: Yes. And besides, I don't think he could testify to the state of mind of some other person, which is practically what this amounts to.

Mr. Brobst: Q. Is there any difference between conducting a move in the yard and out on the road?

A. Not switching moves.

Q. Are they the same whether they are in the yard or on the main line?

A. Comparatively so.

Q. Do you yourself ride on the front footboard of an engine?

The Court: I think that is entirely immaterial.

Mr. Brobst: Q. Who has control of placing the men, the switching crew, on the train? Who tells you where to go?

Mr. Gearin: We object to that, your Honor. This wasn't a switching movement. It would be entirely immaterial what they do on other types of movements.

The Court: Objection sustained. You have already testified on this subject.

Mr. Brobst: I want to show him Plaintiff's Exhibit C.

Q. Now, Mr. Hayden, is there any similarity between that picture there, as to what it shows with reference to the footboard, and what you saw out there two or three days after the accident had happened?

Mr. Gearin: An objection, your Honor.

The Court: What is your objection? [57]

(Testimony of Austin Richard Hayden.)

Mr. Gearin: My objection is on the ground that, first of all, it is not properly identified.

The Court: Objection sustained.

Mr. Brobst: Well, the picture, your Honor, speaks for itself.

The Court: I know, but it is not in evidence.

Mr. Brobst: That is right. All right.

Q. You were not there when that picture was taken, were you? A. No.

Mr. Brobst: That picture was taken about a year after the accident. May I withdraw this witness, your Honor, and see if I can tie these pictures in.

(Witness withdrawn.) [58]

GERALD E. RUTLEDGE

was recalled as a witness in behalf of the plaintiff and was further examined and testified as follows:

Direct Examination

Q. (By Mr. Brobst): Mr. Rutledge, will you look at those three pictures that were just handed to you by the Bailiff. Look at all three of them. Were you present when those pictures were taken?

A. Yes, I was.

Q. Who was the photographer that took those pictures?

A. A man working out of Mr. Guderian's establishment.

Q. Do you recall his name?

(Testimony of Gerald E. Rutledge.)

A. V. A. McMillan.

Q. When were they taken?

A. I couldn't tell you the exact date.

Q. What is your best judgment as to the date?

A. I only recall it was several months after the date of the accident.

Q. They were taken by Mr. McMillan, of Mr. Guderian's office or photographic establishment; is that right? A. Yes, sir.

Q. They are pictures of what?

A. Generally they are pictures of the front end of Engine 2718, as identified by the number plate.

Q. At the time the pictures were taken did you observe the [59] footboards on the engine?

A. Yes, I did.

Q. Would you state whether or not those pictures represent the condition as you saw it when the pictures were taken?

A. Yes, they are representative of what I saw.

Mr. Brobst: That is all.

Cross Examination

Q. (By Mr. Gearin): Mr. Rutledge, as a matter of fact, those photographs were taken in the month of December of 1953, were they not?

A. It could be possible.

Mr. Gearin: That is all.

(Witness excused.)

Mr. Brobst: Now, your Honor, I would like to offer them in evidence as Plaintiff's Exhibits A, B and C.

Mr. Gearin: We object on the ground of remoteness, your Honor.

The Court: I think that remoteness alone is not an absolute objection. As I understand, there was some suggestion that the plaintiff might have to show that the conditions of the footboard were the same. I don't know whether there is any proof to that effect at the present time in the case.

Mr. Brobst: The only testimony, your Honor, is of other witnesses who testified that they are representative of the [60] condition that they saw, and the witness who testified he examined the board the next day has testified that those represent the way the board looked when he saw it the next day. There may be some question of weight, but I think that they are admissible. The weight of them, perhaps, is for the jury. I appreciate the fact they were taken a considerable time afterwards, but it is the best we could do.

The Court: It is my idea that there may be some proof that the conditions were the same. My rulings so far have been based upon the proposition that the pictures themselves would have to be introduced before you made any particular examination into the matter. However, there was an examination of these witnesses which was not objected to, and they testified that the condition was approximately the same. In view of that situation, I will admit the pictures.

(The photographs above referred to were received in evidence as Plaintiff's Exhibits A, B, and C, respectively.)

The Court: Ladies and gentlemen of the jury, of course this is a very serious issue in the case. I am admitting the pictures so that you will have everything before you that bears upon the question. But you must keep in mind that these pictures were taken a year later, and you must make up your minds as to whether the conditions were the same or not. In order to make up your minds as to that, you will [61] have to consider the testimony of the various witnesses that you hear in the case. I am admitting them not for the purpose of proving anything except that they are here, and the taking has been established, and there has been some testimony that the condition within two or three days after was the same.

You may proceed.

AUSTIN RICHARD HAYDEN

was recalled as a witness in behalf of Plaintiff and was further examined and testified as follows:

Direct Examination—(Continued)

Q. (By Mr. Brobst): Now, Mr. Hayden, will you look at Plaintiff's Exhibit B, I believe it is. Does that picture show the condition of the board at the time that you examined it a day or two after the accident?

Mr. Gearin: Again we object, your Honor, as leading.

The Court: Of course, that is true.

Mr. Brobst: I am a little at a loss to know how to frame it.

Q. Is there any similarity between that picture

(Testimony of Austin Richard Hayden.)

and the condition that you saw two or three days after the accident? A. Yes.

Q. What is it?

A. This bolt in the middle of the footboard is as I saw it. [62]

Mr. Brobst: I wonder if we could have him mark that bolt. Your Honor, could we have the witness circle it? That should be marked with an H-1, so we know he is the one that identified the mark.

(The witness marked on the photograph as requested.)

Mr. Brobst: Q. Now is there anything in that picture, Mr. Hayden, that was not there at the time that you examined the footboard after the accident? Do you notice anything on that footboard or anywhere there that wasn't there?

A. Could that question be repeated again?

Q. I will put it this way: Is there any difference between that picture and the condition of the running board as you saw it immediately following the accident?

A. I don't notice any difference.

Q. Have you observed other running boards on other engines there in the yard of that same class?

A. Yes.

Q. And how are the bolts on the running boards of the other engines as far as you have observed them?

Mr. Gearin: An objection as immaterial, your Honor.

(Testimony of Austin Richard Hayden.)

The Court: Objection sustained.

Mr. Brobst: I have no further questions. [63]

Cross Examination

Q. (By Mr. Gearin): Mr. Hayden, you didn't make an inspection of the front of this locomotive the day that Mr. Daulton was killed, did you?

A. No, I didn't.

Q. And it was two, three, or four days later that you saw it?

A. As nearly as I can remember.

Q. Could it have been as much as five days?

A. I just can't remember. But Mr. Teaney left word for me to see him, and I had no idea what he wanted, but it was just a day or two, and he was trying to get hold of me, and he finally got hold of me. I just couldn't say, it happened so long ago.

Mr. Gearin: That is all. Thank you.

(Witness excused.) [64]

THOMAS C. WARMACK

was produced as a witness in behalf of Plaintiff and, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Brobst): Mr. Warmack, what is your business or occupation, please?

A. Locomotive engineer for the Southern Pacific Company.

Q. How long have you been an engineer?

A. About 14 years.

(Testimony of Thomas C. Warmack.)

Q. You are employed in what division of Southern Pacific Company?

A. I work on the Shasta Division.

Q. Does that include Klamath Falls?

A. It does.

Q. Are you familiar with the stretch of track out there by Wocus where this accident happened?

A. I am.

Q. How many times have you been over that particular section of track?

A. Oh, about six or eight times a week for the past eight years.

Q. Now, Mr. Warmack, assuming a train consisting of an engine, two K&J cars that are empty, a spreader, a ditcher, and a caboose, traveling at between two and four miles an hour, in what distance could that move be stopped out on the stretch [65] of track where this accident happened?

Mr. Gearin: We object to the form of the question, your Honor. There is no testimony in the record that the cars were empty, that the cars to which counsel referred were empty.

Mr. Brobst: Is there a dispute about it?

Mr. Gearin: I don't know whether they were or not.

Mr. Brobst: I suggest we can call one of the witnesses back.

Mr. Gearin: I don't want to delay the matter, your Honor. Subject to his tying it up later I will withdraw the objection. Is that O.K.?

(Testimony of Thomas C. Warmack.)

Mr. Brobst: Yes, that is all right.

Mr. Gearin: Because I don't know whether they were empty or full.

A. If the braking equipment was in first-class shape, it could be stopped in anywhere from six to eight feet.

Mr. Brobst: Q. Let's take it the other way. Let's assume that the two cars were loaded. Would that make any difference?

A. Oh, probably a couple of feet.

Q. Just a matter of a couple of feet difference?

A. There wouldn't be much difference if all the braking equipment was in first-class shape.

Q. Now, Mr. Warmack, is there any custom and practice in this division relative to what an engineer should do in the event that a brakeman is riding on the front footboard of the engine [66] and disappears from the engineer's view?

A. The customary practice any time a brakeman disappears from your view you should stop, if you are not certain as to where he is; or if he is not where you can see him, why, you are not certain.

Q. You must stop when he is where you can't see him?

A. You are required by the rules to——

Q. Now, as an engineer, when a move is being made for three-quarters of a mile, do brakemen generally ride out on the front footboard of the locomotive? A. No.

(Testimony of Thomas C. Warmack.)

Q. What would be the reason for a brakeman to be out on the front footboard of the engine?

A. Well, I wouldn't know of any under that circumstance.

Q. Where does he ride if he has no duty to perform, the head brakeman?

A. In the engine.

Q. Who is the one that is to tell him where to ride?

A. Usually the one which is closest to him, which is the engineer, notwithstanding the fact that the conductor has the authority to place his men any place he so desires.

Q. But the usual thing is whoever is closest to him normally does it; is that right?

A. If he is assigned to the head end, then ordinarily he abides by the engineer's instructions while around the engine. [67]

Q. When you are approaching a switch and the brakeman is out on the front footboard, does the brakeman have anything to do with the movement of the train?

A. Well, he doesn't really have anything in particular to do with movement of the train. The engineer ordinarily in that short a distance could tell where to stop. It is a practice sometimes if he is there to give you a stop signal, but oftentimes when he gets a signal you don't know whether he is stopping for a switch or what the condition is. If the signal is given you abide by it.

Q. But you keep him in view all the time?

(Testimony of Thomas C. Warmack.)

A. It is a good practice.

Q. What kind of signals would he give out there as you approached the switch? What kind of signals, if any, would a brakeman give as you approached a switch out there that he was going to line?

A. If you are still moving, he probably would give you a stop signal.

Q. How is that given?

A. Well, if he was standing on the front footboard, why, he would wave his hand in a position like this, which would indicate a stop signal.

Q. Where normally does the engine stop with relation to the switch itself?

A. Oh, generally anywhere from eight to ten feet, and a [68] short train like that it is much easier to stop at a point where you want, within a foot or two, even, for that matter.

Q. You stop right close to the switch?

A. Ordinarily, yes.

Q. Then what does the brakeman do when the stop is made?

A. He gets off the engine and lines the switch.

Q. And then when is the move started again?

A. When he gives a proceed signal. If you are close to the switch, it would be impossible for the engineer to see if the switch points met up properly. Therefore, a move is not supposed to start until such time as it is known that the switch points have met up properly to save a derailment. The brakeman being there, he would be the one to give

(Testimony of Thomas C. Warmack.)

you a come-ahead sign after that has been ascertained.

Mr. Brobst: I think that is all.

Cross Examination

Q. (By Mr. Gearin): Mr. Warmack, in response to a question by Mr. Brobst with regard to the custom and practice, you say that is the rule about stopping when a brakeman goes out of sight?

A. Well, I think there is a rule in the book that requires you to stop when a person is giving a signal, when they vanish from view and you can't see the signal.

Q. All right. That is Rule 7-B of the rules and regulations of the Transportation Department, with which you are undoubtedly [69] familiar, aren't you? A. Yes, sir.

Q. And that rule provides—and I know you will correct me if I am wrong—that in backing an engine or cars, or shoving cars ahead of the engine, the disappearance from view of a trainman or the light by which signals controlling the movement are being given, must be construed as a stop signal. That is the matter to which you referred, is it not?

A. I don't know if they were shoving cars or what not. That is the matter I referred to. You are right.

Q. Now, sometimes brakemen ride out on the front step without any necessity therefor, don't they? A. Well, yes.

(Testimony of Thomas C. Warmack.)

Q. All right. And if you are an engineer and it is daylight and you are going up to a switch where they have a block signal, you don't have to have a brakeman out on the front step to tell you where to stop if you have a short train, do you?

A. No.

Q. In fact, he doesn't have to be out there?

A. No.

Q. He could be riding in the cab if he wanted to be, couldn't he? A. Yes.

Mr. Gearin: That is all. [70]

Redirect Examination

Q. (By Mr. Brobst): Mr. Warmack, if the brakeman is riding out there and in your view and suddenly disappears, what do you do?

A. Well, according to conditions—ordinarily I would stop. There is another rule in the book that covers that.

Q. In other words, that is the customary thing to do, and that is what they do, isn't it?

A. Well, yes, by complying with Rule 108 you are required to do that.

Q. Rule 108 is in case of doubt or uncertainty a safe course must be taken?

A. Right. If you can't see him, you don't know where he is, so you stop.

Q. That is the rule, and that is the foundation for your custom and practice when a man disappears? A. That is right.

Mr. Brobst: I have no further questions.

(Testimony of Thomas C. Warmack.)

Recross Examination

Q. (By Mr. Gearin): Mr. Warmack, if a man is out there in front on the step, and you are approaching a block signal, where do you have to keep your view, on the brakeman, or do you have to watch the block signal?

A. Well, if he is on the front step and you are looking at [71] the block signal you probably can see both of them.

Q. I didn't hear that.

A. I say, if he is on the front step of the engine and you are approaching a block signal, it wouldn't be very difficult to see both of them.

Q. The point is, what do you concentrate on? The block signal, isn't it? A. Safety.

Mr. Gearin: Yes. That is all.

Redirect Examination

Q. (By Mr. Brobst): You concentrate on safety?

A. That is right.

Q. How does the block signal change? What causes it to change? Let's put it that way.

A. If the switch is open, the block signal will go in a stop position if the train is approaching the switch. If there was a train already beyond that signal, extending between the switch and the siding—this train might have gone beyond the siding, and the signal would have already been red. Therefore, the switch would not have any material effect on it at all.

Mr. Brobst: I have no further questions. [72]

(Testimony of Thomas C. Warmack.)

Recross Examination

Q. (By Mr. Gearin): What would happen if you ran through a block signal?

A. You usually get fired.

Mr. Gearin: That is all.

(Witness excused.)

Mr. Brobst: I wonder if I could recall Mr. Williams. [73]

TED T. WILLIAMS

was recalled as a witness in behalf of Plaintiff and, having been previously duly sworn, was further examined and testified as follows:

Direct Examination

Q. (By Mr. Brobst): When was it, Mr. Williams, that you saw the running board of the engine, No. 2718, with reference to the date of the accident?

A. It was either the following Sunday or Monday.

Q. Would you look at Plaintiff's Exhibits A, B and C, and tell me if there is anything in those pictures which you see there now that was not present at the time you made your observations of those running boards.

A. The latter picture I have here in my hand, if this is the engine on my left, that is an unusual type of board.

Q. The one on the left?

A. This is an unusual board.

(Testimony of Ted T. Williams.)

Q. Do you see anything different on the right running board at all?

A. No, I don't. I don't see any difference.

Mr. Gearin: Counsel, may I inquire the number of the photograph to which Mr. Williams referred?

Mr. Brobst: Exhibit A. Exhibit A shows the left running board?

A. Yes, sir; the left-hand side; yes. [74]

Q. With reference to the bolts in the running board on the right running board, do you notice any difference in their condition from the time that you saw it and as represented there in the pictures?

A. No, there don't seem to be. It seems to be the same.

Q. Now, when the brakeman is out on the running board and you are approaching a switch, customarily and under ordinary working conditions would the brakeman give any signals?

Mr. Gearin: Your Honor, this has been gone into before. I hate to object——

Mr. Brobst: Not by this witness.

The Court: The question is one of cumulative testimony. You have gone into that a good many times. It is the custom of this Court to have only three witnesses on a point, but as counsel is probably not acquainted with that, I won't insist; but I suggest you limit your examination to testimony that is not cumulative.

Mr. Brobst: I will withdraw it. That is all. I have no further questions.

Mr. Gearin: No further questions.

(Testimony of Ted T. Williams.)

(Witness excused.) [75]

ROBERT LUCE

was produced as a witness in behalf of Plaintiff and, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Brobst): Mr. Luce, what is your business or occupation, please?

A. Engineer and fireman on the Southern Pacific.

Q. How long have you been an engineer and fireman for the Southern Pacific?

A. Approximately 14 years.

Q. What division are you attached to?

A. The Shasta Division.

Q. What territory does that include?

A. Klamath Falls to Dunsmuir, Dunsmuir to Gerber, and Klamath Falls to Alturas.

Q. What type of work have you done generally?

Q. Would you rephrase that, please?

Q. What type of work do you do generally with the trains?

A. Well, firing and running locomotives, whichever job I am called for.

Q. Do you have anything to do with switching and road work, riding engines, and things of that kind? A. Yes, we do.

Q. Have you yourself operated Engine 2718?

(Testimony of Robert Luce.)

A. I have. [76]

Q. Now, Mr. Luce, is there any custom and practice with regard to what an engineer should do when a brakeman who is in view on the front footboard of an engine disappears from view?

A. The custom or the practice would be to stop immediately to ascertain what has happened to that man.

Q. Is that in conformity with this Rule 108? Are you familiar with that?

A. I am.

Q. That in case of doubt or uncertainty——

Mr. Gearin: Pardon me. I have no objection as yet.

Mr. Brobst: Q. In case of doubt or uncertainty, special care must be taken?

A. That rule, and also the fifth paragraph, Rule M.

Q. Rule M?

A. Yes, in the front of the book.

Mr. Gearin: That the employes must exercise care to avoid injury to themselves and to others, and so forth?

The Court: Is that the one you refer to?

A. Yes, sir.

Mr. Brobst: I was just wondering if we could introduce those rules in evidence, or whether we are governed on that by the pre-trial order. I don't know the procedure. Would it necessitate putting the whole book in evidence?

The Court: No, if you can put a transcript of

(Testimony of Robert Luce.)

the rules that counsel agree to, the particular ones that have been [77] referred to——

Mr. Brobst: Yes.

The Court: There is no reason why that can't be done.

Mr. Brobst: I think that is all.

Cross Examination

Q. (By Mr. Gearin): Now, Mr. Luce, assuming you are an engineer of a train on a train moving on the main line, and you are approaching a block signal. Will you tell the jury whether or not you will have to give your prime attention to that block signal.

A. In a straightaway movement, yes.

Q. Yes. There are lots of times when a brakeman will ride out on the front of the locomotive, on the step, without any necessity for it, are there not? A. Not on my engine, they would not.

Q. All right. If it is daylight and you are approaching a switch, a block signal, you don't have to have a brakeman on the front end of your engine on a short train to tell you where to stop with reference to that switch, do you? Do you understand my question, or would it be better for me to rephrase it?

A. Would you please rephrase it?

Q. If you have a short train, and you are approaching a switch, where it is daylight and clear, is there any necessity to have a brakeman on the

(Testimony of Robert Luce.)

front end of your locomotive to give you a [78] stop signal? A. Not in most cases.

Q. In most cases it is not necessary for him to direct the movement from that position. Is that a fair statement?

A. I would say it depended on the circumstances.

Q. All right. Can you give us a definite answer on these hypothetical facts: It is daylight, the weather clear, a slight downgrade, a slight grade downward on the main line approaching a switch and a block signal, under those circumstances would you feel that it was necessary to have a brakeman on the step of the pilot to direct the movement?

Mr. Brobst: Your Honor, I would like to object to that upon the ground that it does not include the other element, that there were workmen along there, welders, and they were working on the track.

The Court: Yes.

Mr. Gearin: I will reframe the question.

Q. Assuming a short work train on the main line, which consisted of an engine, tender, two K&J cars, ditcher, spreader, and caboose, proceeding at a speed of no more than 10 miles an hour, and approximately at two to four miles per hour, approaching a switch in daylight, with welders alongside the track at a distance of approximately a thousand to fifteen hundred feet from the switch, do you feel that under those circumstances it would be necessary to have a brakeman on the pilot of the [79] engine directing the movement?

A. It would be a good idea.

(Testimony of Robert Luce.)

Q. It would?

A. With workmen involved along the track.

Q. At that distance?

A. If a short move is to be made and you know you are going to head in, it would not be necessary to have a man in the cab. If he wanted to ride the footboard, that would be up to him, more or less.

Q. Then when the brakeman who rides out there in the front gets up there to line the switch, and you come up and stop at the switch, after you stop he gets off and then lines the switch?

A. That is correct.

Q. That is the custom and practice?

A. Yes.

Mr. Gearin: Thank you, Mr. Luce. We have no further questions.

Redirect Examination

Q. (By Mr. Brobst): One question. How close do you normally stop to a switch when you are going to line it, or when a brakeman is going to line it on a short train?

A. If the brakeman is on the pilot, it is possible to go right up to the switch. [80]

Q. He can direct the move from there right up to the switch? A. That is correct.

Mr. Brobst: I have nothing further.

Recross Examination

Q. (By Mr. Gearin): He can line the switch

(Testimony of Robert Luce.)
just as well if he is riding in the cab and gets out and walks up and lines the switch, can't he?

A. Yes, but there would be a delay, if they were in a hurry to clear the main line for an oncoming train.

Mr. Gearin: I have no further questions.

Mr. Brobst: That is all.

(Witness excused.)

(Thereupon the jury was excused, after the usual cautionary instructions by the Court, until Thursday, August 4, 1955, at 9:00 a.m., and after the jury had retired the following occurred out of the presence and hearing of the jury:)

Mr. Brobst: I would like to ask one or two questions, your Honor. I was going to prepare for argument to the jury, and I wanted to do it without interruption. I am going to put in by stipulation this actuarial computation of loss of future earnings, and I was going to multiply it out. I don't [81] want to use the blackboard, but there is no objection, is there, to my giving the total figures and the different percentages, like 2, 3 and 4 per cent, which show the present cash value of that money?

The Court: If you are going into the cash value, I am going to allow him to use the other figure. I think the jury is just as able to compute that as you are. I think when you get into this business of arguing about what the value of money is and what

the results of taxation are, and the results of a computation that anybody can make, as far as that is concerned, you had better keep out of it. The only thing I will say about that is this: If you open it up, I will just let Mr. Gearin argue whatever he wants to.

Mr. Gearin: Your Honor, I now at this time advise the Court that I formally withdraw my requested instructions with regard to the matter of taxation and income and estate taxes.

The Court: I am not going to instruct on the question, because I don't think it has anything to do with it. I think that these factors the jury can compute. It is very easy for them to figure out.

Mr. Brobst: With this table, yes. Sometimes judges say go ahead and put it in, and other times the Court will say not to, and I didn't want to do anything——

The Court: Of course, that is true. I won't stop you [82] from doing it, but I would let the other side go into most anything they wanted to as a result of it.

Mr. Brobst: I just wanted to know how to approach that.

The Court: That is my attitude. I wouldn't stop you from doing it, but when you get into all these things about the value of money and taxation, and so forth,——

Mr. Brobst: It is not the value of money. The cases hold that the true picture is the present cash value figure by the actuarial table. That is the true measure of damages to be presented.

The Court: I don't think there is anything mechanical in it, no matter what the cases hold. I don't think there is anything mechanical in the question of fixing damages. I think you put it up to the jury and let the jury decide. They know what the basic facts are. You can suggest an approach to them, but——

Mr. Brobst: The only reason I had it in mind is one case was reversed because they didn't put the actuarial table in but argued it on the basis of the full loss of earnings.

The Court: You are going to put it in, I take it?

Mr. Brobst: Because the Act says it shall be the present cash value of future earnings. The Act says that.

The Court: Yes, I understand that.

Mr. Brobst: So long as I put in the table and tell them how to figure it out and let them do it themselves, that is all right? [83]

Mr. Gearin: We only waived the identification of that, Mr. Brobst, that actuarial table that you handed me. I said I would have no objection to the identity of it, because you wanted to save expense by not calling an actuary, and I said you didn't have to do that.

Mr. Brobst: What does that mean?

Mr. Gearin: I am saving an objection as to the materiality and relevancy of it. As to the life expectancy table, I have no objection to the jury being instructed as to the man's life expectancy. I think that is proper. But all I did was to waive the iden-

tity of that. If you think I misled you on that and I stipulated that it go in, I will let it go in.

Mr. Brobst: Yes, because otherwise I would have to call an actuary to set up these figures.

Mr. Gearin: I will agree that the actuary, if permitted to testify, would testify in accordance with the statement that you gave me. But I did not intend to waive the objections to it. But if you think I did, I don't want any misunderstanding between us, and I will do whatever you say.

Mr. Brobst: I understood that it would go in, and if I called an actuary he would testify that the earning power of money, according to the actuarial table, is so much.

Mr. Gearin: If that was your understanding of our agreement, I will abide by your understanding of it.

Mr. Brobst: Because otherwise I would have to call an [84] actuary and have him come in and testify. This is by a reputable actuarial concern which we have used any number of times. It is based on the American Experience Table.

The Court: I think that is the normal practice. I would rule, in any event, that that would be sufficient either way. But on this question of argument, I would be guided simply by whatever it seems to the other side is necessary for them to meet whatever argument you make. In other words, generally speaking I will let you argue whatever you want to, and then as to the other side I would let them argue whatever they think is necessary to meet it.

Mr. Brobst: There was one other thing.

The Court: Incidentally, I am not controlled by any rules as to argument as to giving an instruction. I may be very chary about giving an instruction on any of this, because I think the question of damages is for the jury.

Mr. Brobst: That is right.

The Court: I don't think that I will lay down any guides for them as to anything else. The only question involved here is the question of whether you will be permitted to argue some phases about these factors, which have been introduced in a good many cases before me sometimes. But when I am not satisfied that there has been a fair presentation by either side, I will grant a mistrial as a result.

Mr. Brobst: That is what I wanted to be sure of.

The Court: You don't want to get into any trouble. I don't want you to.

Mr. Brobst: There was one other point, and that is this: In argument sometimes I like to refer to the instructions that will be given, and ask the jury to listen for them, to bring out and emphasize a point.

The Court: I would not suggest taking any chance on doing that here.

Mr. Brobst: I don't want to get up and say——

The Court: Not only that, but I have a personal custom, which all judges do not follow, and that is that I do not permit you to argue the law or to say that I am going to give an instruction, because I think that gives undue emphasis to the particular point that is being brought out, and the other side can get up say that I am going to say just ab-

solutely the contrary. I might give something in between. As a matter of fact, I usually don't know what I am going to say to a jury——

Mr. Brobst: I am confronted with that problem myself when I get up to argue sometimes. This other point: I may explain the Act to them, the way it operates, that he was not covered by State compensation, and that the only recovery is under this Act?

The Court: You will have to leave that to me.

Mr. Brobst: That is what I want to know. You are taking [86] all my argument away from me.

The Court: Your argument is simply as to whether the facts bring you under the rules of law.

Mr. Brobst: That is what I wanted to know. I have found out.

(Thereupon an adjournment was taken until Thursday, August 4, 1955, at 9:00 a.m.) [87]

Klamath Falls, Oregon, Thursday, August 4, 1955, Court reconvened, pursuant to adjournment, at 9:00 a.m., and proceedings herein were resumed as follows:

The Court: Proceed.

Mr. Brobst: Your Honor, I would like to call Mr. Shively as an adverse witness. He is an engineer and an employe of the company.

CHARLES J. SHIVELY

was produced as a witness in behalf of the Plaintiff and, having been first duly sworn, was examined and testified as follows:

(Testimony of Charles J. Shively.)

Direct Examination

Q. (By Mr. Brobst): Mr. Shively, where do you live, please? A. Beaverton, Oregon.

Q. What is your business or occupation?

A. Locomotive engineer.

Q. Back on October the 6th of 1952 how long had you been an engineer prior to that time?

A. Since March the 15th, 1951.

Q. And before you came down to work here on the Shasta Division on this work train, where had you been working as an engineer? [88]

A. Out of Eugene and Brooklyn.

Q. What type of trains were you acting on as an engineer?

A. All types; freight trains and switch engines.

Q. Was this your first experience on a work train? A. Yes.

Q. At the time that the accident happened your train was moving along about three to four miles an hour; is that correct? A. Yes.

Q. And it was a clear day? A. Clear.

Q. Nothing to obstruct your vision forward?

A. No, sir.

Q. As you came down there you could see Mr. Daulton until he disappeared from your view?

A. That is right.

Q. When he disappeared from your vision do you have any recollection of how far that was before you came to the switch that he was going to line?

A. Well, I would say 40 car lengths.

(Testimony of Charles J. Shively.)

Q. About 40 car lengths was where he disappeared? A. The last time I seen him.

Q. That is when he disappeared from your view, about 40 car lengths from the switch?

A. I would say that is the last time I seen him.

Q. Do you know where he was after that at all?

A. No, sir.

Q. Then you continued on for about 40 car lengths, is that correct? A. That is right.

Mr. Brobst: That is all. I have no further questions.

Cross Examination

Q. (By Mr. Gearin): Mr. Shively, as you approach a crossing what if anything directs your attention?

A. To the block signal and the right-of-way.

Q. Mr. Shively, are you familiar with the custom and practice regarding the operation of--your Honor, this is not proper cross examination, because it is not within the scope of Counsel's direct examination, and I will shorten it up because it will obviate the necessity of recalling the witness.

The Court: No, let's put the plaintiff's case on.

Mr. Gearin: All right. I have no further questions for the time being. That is all.

(Witness excused.) [90]

MARY EDITH DAULTON

the Plaintiff herein, was produced as a witness in her own behalf and, having been first duly sworn, was examined and testified as follows:

(Testimony of Mary Edith Daulton.)

Direct Examination

Q. (By Mr. Brobst): Mrs. Daulton, where do you live, please?

A. 3446 Greenwich Street.

Q. Donald L. Daulton was your husband?

A. Yes, sir.

Q. How old was he on October 6th of 1952?

A. He was 33.

Q. And how old were you? A. 35.

Mr. Brobst: I believe, Counsel, we can stipulate to his earnings without calling——

Mr. Gearin: We have the record here.

Mr. Brobst: I think that would be better. Would you stipulate, Counsel, that his gross earnings for the ten months preceding his death were $4,892.06?

Mr. Gearin: That is correct.

Mr. Brobst: Q. Are there any children?

A. Two.

Q. What are their ages?

A. Well, she will be seven in October and he will be nine in September.

Q. Now, as far as the conduct of your husband toward the [91] children, would you explain what he did in his spare time?

A. Mostly fishing. He was quite a home man.

Q. What was the general condition of his health?

A. Good.

Q. What had he done prior to working for the railroad?

A. Well, he was in the Marine Corps, World

(Testimony of Mary Edith Daulton.)

War II. Then he was in the Reserves a year before he was killed.

Mr. Brobst: I have no further questions.

Mr. Gearin: I have no questions.

(Witness excused.)

Mr. Brobst: Your Honor, at this time I would like to offer into evidence by way of stipulation Plaintiff's Exhibit No. D. I believe that the stipulation is if an actuary were called, a qualified actuary, that his testimony would be the same as the figures and percentages that are outlined on this document.

Mr. Gearin: That is correct, your Honor. However, we would like to reserve, and we interpose an objection as to the materiality of the actuarial computations. I think that is sufficient for the purpose of the motion.

The Court: Overruled. Admitted.

Mr. Gearin: Very well, your Honor.

(The Actuarial Table referred to was thereupon [92] received in evidence as Plaintiff's Exhibit D.)

Mr. Brobst: We offer into evidence a transcript of the rules which are attached to the pre-trial order.

Mr. Gearin: We waive the identity of them. Some of them, your Honor, like Rule 7, apply to switching movements, which is not applicable here. I think only the fourth paragraph of Rule 7-B is applicable, Counsel——

The Court: Let's not discuss that at the present time. Before we close the case you agree on the rules.

Mr. Gearin: I will withdraw my objection to them, your Honor. They may all go in.

The Court: All right.

(The transcript of rules above referred to was received in evidence as Plaintiff's Exhibit E.)

Mr. Brobst: The plaintiff will rest, your Honor.

Defendant's Witnesses

HARVEY TEAL

was produced as a witness in behalf of Defendant and, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Gearin): Mr. Teal, where do you live? A. Klamath Falls.

Q. What is your occupation?

A. Trainman for the Southern Pacific.

Q. How long have you been railroading?

A. Thirty-two years.

Q. As trainmaster what are your duties?

A. Well, they consist of supervision of the operation of trains on the Shasta Division.

Q. Does that include the operation of trains within a radius of 10 miles of Klamath Falls?

A. Yes, sir.

(Testimony of Harvey Teal.)

Q. Particularly with regard to work trains on the main line in the vicinity of Wocus siding?

A. Yes, sir.

Q. Are you familiar with the custom and practice of this division with reference to the operation of trains? A. Yes, sir.

Q. Will you state whether or not there is any custom and [94] practice with regard to the operation of a train upon the disappearance from view of a trainman apart from Rule 7-B?

A. No, sir.

Q. The purpose of Rule 7-B is what, Mr. Teal?

A. The purpose of Rule 7-B——

Mr. Brobst: Your Honor, I will object to that. I think the rule speaks for itself.

The Court: As I understand, you have introduced evidence of a custom and the interpretation of these rules yourself.

Mr. Brobst: All right. I will withdraw the objection.

The Court: I think it is just as fair for one side as the other. Proceed.

Mr. Gearin: Do you understand the question?

The Witness: May I have the question again?

(Last question read.)

A. The purpose of Rule 7-B is to afford the engineer eyes or protection in a movement where he is backing up or shoving cars ahead of the engine.

Mr. Gearin: I have no further questions.

(Testimony of Harvey Teal.)

Cross Examination

Q. (By Mr. Brobst): What about Rule 108? Do you know that rule?

A. Rule 108—I don't believe I can quote it in its entirety exactly like it is worded, but it has to do with [95] taking special care when there is any case of doubt, I believe.

Q. That is right. And if a man is riding out on the front end of the engine and he goes out of the view of the engineer and the engineer doesn't know where he went, do you just keep right on going?

A. Depending entirely on the way the engine is headed. If it is headed forward, there would be no occasion for apprehension.

Q. If this man has gone off the front footboard where he is riding, disappears from view, and the engineer doesn't know where he went, the engineer would keep right on going?

A. I would say yes.

Mr. Brobst: I have no further questions.

Mr. Gearin: Thank you.

(Witness excused.) [96]

CHARLES J. SHIVELY

was thereupon produced as a witness in behalf of the Defendant and, having been previously duly sworn, was further examined and testified as follows:

Direct Examination

Q. (By Mr. Gearin): Mr. Shively, in your years of railroading are you familiar with the cus-

(Testimony of Charles J. Shively.)

tom and practice with reference to the operation of trains? A. Yes, sir.

Q. Mr. Shively, do you know of any custom and practice with reference to the disappearance from view of a trainman apart from the provisions of Rule 7-B? A. No, sir.

Q. Now, as you approached the siding I believe you testified your view was concentrated upon the block signal. A. Yes, sir.

Q. Will you explain to the jury, please, what a block signal is and its purpose.

A. Well, it is a signal for safety precautions, and tells you whether another train is approaching, and it keeps the trains from having an accident, from coming together. You have three aspects: The yellow—well, I should say the green, yellow and red. You are governed by all three aspects. The reason I was watching it was we were going in on a siding [97] for a freight train.

Q. Where was the freight train coming from? In what direction?

A. Coming from a westerly direction, approaching us. We were traveling in an easterly direction, railroad direction east. And it is more or less a practice to watch the block signals to determine just about where that train is at. And the block signal being in a clear position tells you that he is at least two miles away, for that covers back at least that far. It is just a common practice to more or less watch the block signal and use it for a governing point where to stop and to head in at the

(Testimony of Charles J. Shively.)

switch. The switch is just at the block signal, and it is more or less of a point that shows you where you have to stop.

Q. Mr. Shively, on the day of the accident was Mr. Daulton directing the movement?

A. No, sir.

Mr. Brobst: I will object to that, your Honor, as leading.

Mr. Gearin: I will withdraw the question and stipulate that the answer may be stricken.

The Court: I think it is leading.

Mr. Gearin: Q. What was Mr. Daulton doing, as far as you know, on the front footboard of the locomotive?

A. Riding down to the switch. [98]

Q. State the fact as to whether or not you were relying upon him for assistance in any way with reference to the switch or stopping your locomotive?

A. No, sir.

Q. What was the first indication you had that something was wrong, Mr. Shively?

A. That the switch had not been lined up, because if he had lined the switch the block would have went red, and it was still in a clear position.

Q. You say that the last time you saw Mr. Daulton was how far away from where you stopped?

A. Approximately 40 car lengths.

Q. Were you watching Mr. Daulton, or what were you doing with reference to him?

A. No, sir; no, sir. I wasn't watching him.

(Testimony of Charles J. Shively.)

Q. Are you able to advise us or do you know at all where he went out of your sight?

A. Sometime after I had seen him wave his arm at somebody along the right-of-way.

Q. Who were they, do you know?

A. Well, it was a track welder.

Q. How far was that from where you stopped for the switch?

A. Approximately 40 car lengths.

Q. Now after the accident, Mr. Shively, did you examine the front of the locomotive? [99]

A. I walked around the front of it, yes.

Q. Do you have any knowledge whatsoever of any work done to the left footboard prior to the morning that you started out on October 6th?

A. Yes.

Q. Will you tell the jury what that was.

A. There was a new footboard put on the engine.

Q. On what side was that?

A. On the left side.

Q. And the last time you saw Mr. Daulton he was riding on which side?

A. The right side.

Q. Did you examine the right footboard after the accident? A. Yes.

Q. Tell the jury what you saw, if anything, with reference to the right footboard.

A. It was just in good condition, as far as I know.

Q. Will you state whether or not there were any

(Testimony of Charles J. Shively.)

bolts projecting in the center of the footboard on the right side of the locomotive? A. No.

Mr. Brobst: I will object to that, your Honor, as leading.

The Court: Yes. Objection sustained.

Mr. Brobst: The answer is in now. [100]

The Court: The answer is stricken. In the future, Counsel, be careful about leading questions.

Mr. Gearin: I tried to be, your Honor.

The Court: The damage is done when the answer is in.

Mr. Gearin: Yes, your Honor.

Q. Mr. Shively, through the courtesy of Mr. Hadlock I am handing you some exhibits which have been marked as Pre-Trial Exhibits 2-A to 2-R, inclusive. They are in no particular order, but one at a time I will ask you to identify, if you can, the exhibits that are being handed to you. And, please, Mr. Shively, when you are identifying any of these exhibits, look at the back thereof and state first the number that appears on the reverse side, and tell the jury thereafter, if you can, what it is you have in your hand.

A. 2-N, the footboard of a locomotive.

Q. Of what locomotive as of what time?

A. I don't know.

Q. Will you take the next one, please.

A. 2-J.

Q. Can you identify that?

A. The footboard of a locomotive.

Q. Do you know what locomotive that is?

(Testimony of Charles J. Shively.)

A. No, sir.

Q. All right. Take the next exhibit.

A. 2-Q, the footboard of a locomotive. [101]

Q. Do you know which one it is?

A. No, sir. 2-M.

Q. Do you know what that is?

A. It is a footboard of a locomotive.

Q. Do you know of what locomotive?

A. No, sir.

The Court: Don't you know whether he knows or not? Why go over a whole list of photographs like this?

Mr. Gearin: I had assumed that he did, your Honor.

The Court: But he doesn't. Let's stop now. Give him those that you know he can testify to; not go over a whole list that he doesn't know anything about.

Mr. Gearin: All right. I am sorry, your Honor. Will you hand those to the witness and I will ask him if there are any of those pictures that he can identify, and which ones.

Mr. Brobst: Your Honor, he just went through all of them and said he couldn't identify them.

The Court: I don't know that, Counsel.

The Witness: This is 2718.

Mr. Gearin: That is the locomotive that was involved in this accident? A. Yes, sir.

The Court: What exhibit is that?

A. Exhibit 2-I. [102]

Mr. Gearin: Q. With reference to the locomo-

(Testimony of Charles J. Shively.)

tive and with reference to the time of the accident, can you state as of what time that picture—I don't want to ask leading questions, but I am having the same trouble Mr. Brobst had yesterday—will you state as of what time that shows Engine 2718.

A. This photograph here?

Q. Yes, sir.

A. Well, this photograph here has no new footboard on the left side.

The Court: That answer is stricken.

Mr. Gearin: I have no further questions.

Cross Examination

Q. (By Mr. Brobst): Mr. Shively, as you came down toward the block signal you had to pass a welder who was working there alongside of the track, didn't you? A. Yes.

Q. Your attention was on, you say, the block signal? A. Yes, sir.

Q. That is a straight track out there, isn't it? You can see for four or five miles down the track?

A. No, sir. There is a curve. We came out of a curve and were coming into a curve. This is prior to CTC. Since [103] then I don't know how the track has been.

Q. How long had you worked on that particular section of the track before the accident?

A. Oh, I would say approximately three months off and on, firing and running engines.

Q. All right. Now, as you came down there you say that you were concentrating on the block signal

(Testimony of Charles J. Shively.)

and were watching along the track to see whether the workmen may have mislaid something along the track. A. I was.

Q. Then your attention was forward, directed to anything that might be forward of your engine; is that correct? A. That is right.

Q. So that your concentration or your looking was not only to the ground but it was to the block signal, and Mr. Daulton was squarely in the middle between the tracks and the block signal; is that correct? A. That is right.

Q. Mr. Shively, do you remember the taking of your deposition in Portland, back on March 9th of 1955, when I was representing the plaintiff and asking you questions and Mr. Gearin was there representing you?

Mr. Gearin: No, I wasn't there.

Mr. Brobst: I am sorry. Mr. Oglesby H. Young of Koerner, Young, McColloch & Dezendorf was representing you. [104]

Q. I would like to have this handed to you and I would like you to read Page 15, please.

Mr. Gearin: I think the original should be handed to the witness.

Mr. Brobst: If the deposition is there.

Mr. Gearin: We object to this, your Honor. The deposition has not been marked as a pre-trial exhibit.

The Court:: I had this pre-trial order amended for the purpose of putting in all the exhibits. Why wasn't it put in?

(Testimony of Charles J. Shively.)

Mr. Brobst: I thought it was filed with the Clerk and would be part of the record. I may have been mistaken. I certainly would have marked it as an exhibit.

The Court: All right. Let's mark it now and put it in the pre-trial order. The original will be marked and a proper notation made in the pre-trial order. If Counsel were not unacquainted with the custom of this Court, I would not permit this.

Mr. Brobst: Yes, I appreciate that.

(The deposition of Charles J. Shively was thereupon marked Plaintiff's Pre-Trial Exhibit F.)

The Court: However, it will be used only for the purpose of impeachment.

Mr. Brobst: Yes, your Honor. [105]

Q. Just prior to reading that, your testimony is that he went from your view when you were about 40 car lengths away from where the welders were working? A. Yes.

Q. I mean from where the switch was? Pardon me.

Mr. Gearin: He said he didn't notice him after that.

Mr. Brobst: Q. One other question: Did Mr. Daulton make some signal or sign as the train went by the welders?

A. I seen him raise his hand, yes, and wave to them like a train was coming.

Q. Did he give a slow signal? A. No, sir.

(Testimony of Charles J. Shively.)

Q. What kind of a wave did he give?

A. Just like a highball that a train was coming.

Q. All right. Will you read Page 12, please. Read it to yourself. Do you recall at that time my asking you these questions and you giving the following answers, referring to Mr. Daulton:

"Q. Did he ever disappear from your view?

A. Just before we got to the switch.

Q. How far before you got to the switch?

A. I don't recollect how far offhand, it has been so long ago.

Q. What did you do when he disappeared from your view? [106]

A. I stopped at the switch.

Q. How far was that, would you say, that you traveled? A. That I traveled?

Q. Yes, after he disappeared and down to the time you got to the switch.

A. I stopped about a half an engine length from the switch.

Q. You stopped about a half-engine length, about half the length of the engine from the switch. How far would that stopping point be from where you first saw Mr. Daulton disappear?

A. I don't recall that.

Q. Have you any idea at all?

A. No, I have not."

Now, Mr. Shively, since the taking of that deposition what has refreshed your recollection that you saw him disappear some 40 car lengths from the

(Testimony of Charles J. Shively.)

switch and that you traveled that 40 car lengths after he disappeared?

Mr. Gearin: We object to the form of the question, your Honor. Mr. Shively's testimony is he didn't see him after that 40 car lengths.

The Court: I think the objection will be sustained, because I don't think it is impeachment.

Mr. Brobst: I have no further questions. [107]

Mr. Gearin: I have no further questions.

(Witness excused.)

(Short recess.)

Mr. Gearin: If the Court please, pursuant to the terms of the pre-trial order, in which the pre-trial exhibits have been marked, it being agreed that no further identification of the exhibits is necessary, we offer Defendant's Pre-Trial Exhibits 2-A to 2-H, inclusive.

Mr. Brobst: Does the pre-trial order show when they were taken?

Mr. Gearin: No. The photographer who took them advises me they were taken the morning after the accident.

Mr. Brobst: All right, so long as we have the time when they were taken.

Mr. Gearin: They were taken on October 7th, your Honor.

Mr. Probst: That will be established by proof? I can't stipulate to that.

Mr. Gearin: Yes, it will be by the next witness.

The Court: All right. Admitted.

(The photographs referred to, having been previously marked as pre-trial exhibits, were received in evidence as Defendant's [108] Exhibits 2-A to 2-H, respectively.)

JAMES F. IRVINE

was produced as a witness in behalf of the Defendant and, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Gearin): What is your occupation, Mr. Irvine? A. Claims agent.

Q. By whom are you employed?

A. Southern Pacific Company.

Q. By whom were you employed on October 6th, 1952? A. Southern Pacific Company.

Q. Have you ever had occasion to photograph Engine 2718? A. Yes, I did.

Q. When and where?

A. In the Klamath Falls roundhouse on the night of October 6th, 1952.

Q. I am handing you Pre-Trial Exhibits 2-J, 2-N, 2-Q, 2-M, 2-I, and 2-K. I will ask if you can identify those. A. Yes, sir.

Q. Will you advise us what they are.

A. Those are the pictures that I took of Engine 2718 at that time and place. [109]

Mr. Gearin: Mr. Kenyon, will you hand to the witness the exhibits marked 2-A to 2-H, inclusive, that you now have in your hand.

Q. Referring to Exhibits 2-A to 2-H, Mr. Irvine,

(Testimony of James F. Irvine.)

I will ask you the preliminary question where were you on the morning of October 7th, 1952?

A. I was in the Klamath Falls yards.

Q. Do you know where Engine 2718 was at that time? A. It was in the roundhouse.

Q. With regard to the exhibits that you hold in your hand, will you state, if you know, when they were taken.

A. They were taken on the morning of October 7th, 1952.

Q. Do you know by whom?

A. Yes, I do.

Q. Who took them? A. Frank Scott.

Q. Under whose direction or supervision, if any?

A. Mine.

Mr. Gearin: Now we ask, your Honor, that Exhibits 2-I, 2-J, 2-K, 2-L, 2-M and 2-N be received into evidence under the testimony and under the provisions of the pre-trial order.

The Court: There is another question that should be asked under those circumstances, to lay a proper foundation, and that is whether they correctly represent the situation.

Mr. Gearin: I was afraid of a leading question, your [110] Honor.

The Court: Go ahead with that.

Mr. Gearin: Q. Mr. Irvine, will you state what the fact is as to whether or not the photographs which you have in your hand and the photographs that you took are or are not a correct and true

(Testimony of James F. Irvine.)

representation of the object that is shown in the photographs.

A. Yes, they are true representations.

Mr. Gearin: We renew our offer into evidence, your Honor.

The Court: Admitted.

(The photographs referred to were thereupon received in evidence as Defendant's Exhibits 2-I, 2-J, 2-K, 2-L, 2-M and 2-N, respectively.)

Mr. Gearin: I have no further questions. Thank you, Mr. Irvine.

Cross Examination

Q. (By Mr. Brobst): Mr. Irvine, who was out there with you when the pictures were taken, the ones on the night of October 6th?

A. I believe Mr. Patterson was.

Q. Do you know whether any work had been done on that engine before the pictures were taken?

A. No, no work had been done.

Q. You don't know that, do you?

A. Yes, I do.

Q. Was any work done?

A. Let me correct myself there. There was no work done. That is true.

Q. I didn't hear you.

The Court: He said there was no work done.

Q. There was no work done. To your knowledge, Mr. Irvine, was the condition of the engine's running board changed any after those pictures were taken? A. No.

(Testimony of James F. Irvine.)

Q. What was that? A. No.

Q. The engine is in the same condition, or the condition of the footboards of that engine haven't changed any since the time of the pictures?

A. The condition of those footboards hasn't changed; no, sir.

Q. Have those footboards been on that engine ever since the taking of the pictures?

A. No, sir.

Q. When were they removed?

A. A day or so after the accident.

Q. Do you have a work report showing when they were removed? A. I believe there is one.

Mr. Brobst: Counsel, do you have a work report showing when they were removed?

Mr. Gearin: Here are the only work reports I have with reference to that locomotive. I showed you those this morning. These are the only ones of which I have knowledge.

Mr. Brobst: Q. Mr. Irvine, I notice here that you have reports. Now as claims agent for the Southern Pacific are you familiar with the requirement that there must be a daily locomotive inspection report made?

A. I am not familiar with the requirements. I know there is such a report made.

Q. Yes. I notice on this Defendant's Exhibit it says "Daily Locomotive Inspection and Repair Report." You said you are not familiar with that?

A. No, I am not.

Q. Here are the daily reports that have been

(Testimony of James F. Irvine.)

presented as exhibits from October 4th through to 8-22-53. I would like, if permissible, to have them handed to the witness. Will you go through these and see if you can find any place in those daily reports where anything was done as far as the right running board was concerned.

The Witness: Would you repeat the question, please.

(Last question read.)

A. No, I can't find anything.

Q. Mr. Irvine, to your own knowledge do you know whether or not any work was done on the right running board from the time of the happening of the accident until the pictures were taken by you? A. No, no work was done.

Q. Do you know of your own knowledge?

A. I would have to ask you to explain what you construe as my own knowledge.

Q. When was the first time you saw the engine?

A. The first time I saw the engine?

Q. After the accident.

A. Was in the evening of October 6th, 1952.

Q. And the accident happened about 2:00 in the afternoon, or 3:00? A. Approximately.

Q. You don't know what was done with the engine between that period from 3:00 o'clock until the time that you saw it?

A. Only by what was reported to me.

Q. So then you don't know of your own knowledge what might have happened to it in that three-hour period?

(Testimony of James F. Irvine.)

A. Other than what was reported to me.

Mr. Brobst: I have no further questions.

Redirect Examination

Q. (By Mr. Gearin): Mr. Irvine, do you know whether or not the work of removing [114] or replacing the footboard on the pilot would be required to be reported under the daily inspection and repair work?

A. Well, it would be my understanding that it would not.

Mr. Brobst: Your Honor, I will object to what his understanding is.

The Court: Yes. Stricken.

Mr. Gearin: Q. The question is, Mr. Irvine, do you have any knowledge as to whether or not that work is covered. You can answer that Yes or No, please. A. No, I don't.

Mr. Gearin: All right, sir. That is all.

(Witness excused.) [115]

HAROLD PATTERSON

was produced as a witness in behalf of the Defendant and, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Gearin): Mr. Patterson, what is your occupation? A. Boilermaker.

Q. By whom are you employed?

A. Southern Pacific Railroad.

(Testimony of Harold Patterson.)

Q. By whom were you employed and what was your work on October 6th, 7th and 8th in the month of October, 1952?

A. Southern Pacific Railroad.

Q. Do you recall the occasion when Mr. Daulton lost his life? A. Yes.

Q. Bearing that date in mind, will you state whether or not thereafter you ever had any occasion to perform any work on Engine 2718?

A. I was instructed to remove the pilot.

Q. Do you recall when that was with reference to Mr. Daulton's death?

A. It was about two or three days after the accident.

Q. Will you describe what the pilot is.

A. Well, it is known as a combination pilot and footboard. It can be used for road service or switching service. [116]

Q. Through the courtesy of the Bailiff I am handing you Defendant's Exhibit 2-E. I will ask you if you can point out, please, where the pilot is on the locomotive.

A. Well, the pilot is the complete section across here that fastens to the pilot beam. This whole section is known as the pilot.

Q. And does that include one or both footboards? A. Both footboards.

Q. And anything in addition to the footboards?

A. Yes. The little metal part in between is known as the pilot.

Q. Is that what we call the cow-catcher?

(Testimony of Harold Patterson.)

A. Yes.

Q. Now I am handing you Exhibit No. C, and I will ask you if you can identify the pilot in that picture.

A. This is the pilot that was put on after we removed the original one.

Q. Who put the one on that is shown in that photograph? A. I did.

Q. When was that done with reference to the time that you took the pilot off the engine?

A. The same day.

Mr. Gearin: I have no further questions. [117]

Cross Examination

Q. (By Mr. Brobst): Mr. Patterson, who instructed you to remove it? A. My supervisor.

Q. When any work is done on an engine, aren't you required to make a report?

A. Well, this was not considered repair work. It was just removed to keep as evidence.

Q. Mr. Patterson, don't you keep a daily report of each engine as it comes in? A. Yes.

Q. Do you keep those in a clip file in rotation?

A. Yes.

Q. What would be the explanation if some of the reports are missing?

Mr. Gearin: Now, your Honor, I resent that accusation of Counsel, that certain of those things were prepared for the purpose of showing repairs to the locomotive as shown by the photographs, particularly A, B and C, with reference to the time

(Testimony of Harold Patterson.)

that the headlight shield was taken out, and other things like that. And I resent the accusation that there are missing things and that the true record is not here. If he had wanted those records, we could have gotten them.

Mr. Brobst: I intended no accusation, your Honor; just an explanation. [118]

The Court: If the witness knows, he may say so. Do you know why some of these reports may be missing? A. No, I don't.

The Court: Go ahead.

Mr. Brobst: Q. Now, you have that exhibit before you, Mr. Patterson. Looking at it, do you see a bolt in the center of the footboard there, the bolt head protruding?

A. This here is the pilot that was put on to replace the original one that was involved in the accident.

Q. You put one on that shows the bolt head protruding after the accident; is that correct?

A. Yes.

Mr. Brobst: I have no further questions.

Redirect Examination

Q. (By Mr. Gearin): Mr. Patterson, did you make an inspection report covering the change of the pilot in this instance? A. No.

Q. Why not?

A. The report was on the clipboard, and there was no—that I know of there wasn't anything there

(Testimony of Harold Patterson.)

to sign for. There was no repair work made to that original pilot.

Mr. Gearin: That is all.

(Witness excused.) [119]

W. T. CHRISTENSEN

was produced as a witness in behalf of the Defendant and, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Gearin): Mr. Christensen, what is your occupation?

A. I am with the Oregon State Police.

Q. In what capacity? A. Patrolman, sir.

Q. What was your work in October of 1952?

A. I was patrolling North Highway 97.

Q. That is in Klamath County?

A. Klamath County, sir.

Q. Directing your attention to the hour of approximately 3:00 o'clock on the afternoon of October 6th, 1952, where were you about that time?

A. I was just about at the city limits of Klamath Falls.

Q. Were you informed as to Mr. Daulton's death? A. Yes, sir.

Q. What did you do upon receipt of that information?

A. I went to Wocus and went over to the railroad tracks and went up to investigate the accident.

(Testimony of W. T. Christensen.)

Q. Did you have occasion on that day to see Engine 2718? A. Yes, sir.

Q. Will you state what the fact is as to whether or not, [120] Officer Christensen, you made an investigation concerning the death of Mr. Daulton.

A. Yes, I checked it.

Q. What did you do with reference to Engine 2718?

A. I looked the engine over to see if there was any defects on the front of it where he could possibly have fell off, or something.

Q. Will you state whether or not you made any examination of any particular part of the front portion of the locomotive.

A. I looked the boards over on the front end and the handrails over.

Q. Did you get on any portion of the locomotive? A. Yes, I stood on both boards.

Q. Will you state what the condition of the footboards was.

A. One footboard was fairly new, I would say, and the other was—it looked like it had some service. It was oily.

Q. You are being handed Exhibit 2-I. I will ask you if you can identify that. A. Yes.

Q. What is that?

A. That is the engine that I was out to investigate the accident on.

Q. Can you compare the condition of the locomotive as shown in that photograph with the condition of the front of the locomotive as you observed

(Testimony of W. T. Christensen.)

it at the time you went out and made [121] your investigation? A. It looks the same; yes, sir.

Mr. Gearin: I have no further questions.

Cross Examination

Q. (By Mr. Brobst): Officer, did you take any particular note of the presence or absence of any bolts on any of the running boards or on the footboard? A. No, sir; I didn't.

Q. You can't give us any information, then, with reference to the condition of the bolts on the running boards?

A. The only thing—no, not as to bolts. I just remember the one board and the other board.

Q. One board was new and the other one looked like it had been used and was oily?

A. Yes, sir.

Q. Also, Officer, did you have occasion to go on the track and retrieve any of the personal effects of Mr. Daulton? A. Yes, I did, sir.

Q. For what distance were they along the track as you observed them in picking them up?

A. I couldn't tell the exact distance, sir. I would say 75 feet.

Q. Now the board that was oily, that was the board where [122] the man fell; is that correct?

A. I don't know that, sir.

Q. Could you tell whether it was the right or the left running board?

A. Well, I was facing the engine. The engine

(Testimony of W. T. Christensen.)

was heading north. The new board was on my right.

Q. And the oily one was on your left?

A. That is right, sir.

Mr. Brobst: I have no further questions.

(Witness excused.)

Mr. Gearin: We would like to introduce into evidence, your Honor, Pre-Trial Exhibit No. 3, being the time return and delay report of engine and train employes; also Exhibit No. 5, consisting of a diagram of the scene of the accident and the rail defection test; also Exhibit No. 6, reports of engine inspection, these exhibits having been referred to in the pre-trial order and in which identification was waived. Will you show them to Counsel, please.

Mr. Brobst: Your Honor, the only document I see no objection to is the report of inspection, but the other two I don't know the purpose of.

Mr. Gearin: No particular purpose, your Honor, with the exception of the delay report, which shows the time that the [123] train got into Klamath Falls that evening. I think that has a bearing upon the question as to whether or not any work was done there before the photograph was taken. It is not tremendously important, but the map merely shows the curve and the siding, and the deflection test shows that the rail was not rough.

Mr. Brobst: I have no objection to them. I can't actually——

The Court: If there is no objection, let's admit them. They were shown to you and they are in the

pre-trial order. If there is no specific objection, I will admit them.

(The documents above referred to, as identified in the pre-trial order, were received in evidence as Defendant's Exhibits 3, 5 and 6, respectively.)

Mr. Gearin: The defendant rests, your Honor.

Mr. Brobst: The plaintiff rests, your Honor.

Mr. Gearin: I would like to present a legal matter to your Honor.

The Court: Ladies and Gentlemen of the Jury, you are now excused for a few moments while some legal matters are being taken up.

(Thereupon the jury was excused from the courtroom, in custody of the Bailiff, [124] and the following occurred out of the presence and hearing of the jury:)

Mr. Gearin: At this time, if the Court please, the defendant respectfully moves the Court for an order directing the jury to return a verdict against the plaintiff and in favor of defendant on the ground and for the reason that there is no satisfactory evidence or no evidence of any kind that the bolt shown in the photographs which have been described by the witnesses who examined the engine after the accident was there at the time. There is no testimony of any defect in the locomotive under the Boiler Inspection Act, and there is no evidence of negligence under the Federal Employers Liability Act, nor is there any evidence of any act or omission on the part of defendant constituting a

proximate cause of the death of the deceased. Furthermore, there is no evidence that any defect in the locomotive, had there been one, caused the death of the deceased.

I merely want to say, your Honor, that the numerous cases construing the Federal Employers Liability Act, the Safety Appliance Act and the Boiler Inspection Act are well known to the Court, and I presume they are to Counsel. I am going to say this: That the statement of facts in the pre-trial order, Paragraph I, recites that Donald Roy Daulton received injuries which resulted in his immediate death. I will admit for the purpose of the record that there is testimony [125] that there was a custom and practice with regard to the stopping of a locomotive in a short distance. Coupled with the reaction time which one must consider in defining a short distance, there is no testimony by which the jury can infer anything other than that the deceased met his immediate death as soon as he somehow—we don't know how—got under the locomotive. I submit that to permit the jury to pass upon the charges and contentions made in this case by the defendant would be an invitation to the jury to step into the realm of speculation and surmise. There is no testimony by which we can infer how the man met his death.

The Court: That is all right. The Supreme Court has laid down a very different rule about that. They say the jury is supposed to pass on it, so I am going to let them pass on it. I reserve the motion.

Mr. Brobst: Thank you, your Honor.

The Court: At this time I may as well discuss the question of instructions. I think that there are some things in the instructions I should call your attention to. According to the Civil Rules I am supposed to give you an idea as to what I will do with the requested instructions. I hereby reject them all.

Now I think I will indicate about what line I am going to take. Generally speaking, I think that the method will be simply to instruct with the ordinary instructions that [126] are given in a case of this sort. I will not read any statutes to the jury, but I will give them the effect of the statutes in each instance.

I am going to submit to the jury this question of whether there was any defect on the running board at the time of the accident within the scope of the Federal Boiler Inspection Act. There seems to be a little difference between counsel, and of course in this type of case counsel are both very experienced and know what it is all about.

What do you think the line is in here, where the instructions seems to depart from the normal and seem to depart also from the pre-trial order? As I understand the situation, notwithstanding the requests that have been put up to me, the duty is a continuing one and an absolute one as far as the condition of the engine is concerned, and proof of a defect dangerous to life and limb is proof in and of itself of negligence. The only question, as I understand it, is a question of whether that was a proximate cause of the accident.

Now I don't know that the instructions carry that out, but the instructions that are asked by the plaintiff seem to indicate that the duty is one of ordinary care to keep the equipment in order. Is that your idea?

Mr. Brobst: There were two phases of it that I tried to present. One is that it is a continuing duty to provide him [127] with a reasonably safe place to work. That is the negligence charge. And the other one is that there is an absolute duty under the Boiler Inspection Act to keep it safe as to life and limb.

The Court: With regard to that the only question in this case would be the question of whether that was a proximate cause?

Mr. Brobst: That is right, your Honor. That is correct.

The Court: All right.

Mr. Gearin: There is a question as to whether or not there was a defect, your Honor. You are not going to instruct the jury that there was a defect and leave only the question of proximate causation? Maybe I misunderstood your Honor. Maybe I am being unduly sensitive about that.

The Court: I think counsel are extremely sensitive, because I have never had the idea that the question of whether there was a defect was not one for the jury.

Mr. Brobst: That is true.

The Court: Now, this question of proximate causation, in that respect if the jury finds in that regard that there was a defect and that it contrib-

uted proximately to cause the death, that is sufficient, isn't it?

Mr. Brobst: That is sufficient.

Mr. Gearin: I am afraid so. [128]

The Court: That was my idea about that. Now, where otherwise than that do you have any question of a safe place to work?

Mr. Brobst: I don't think we have, frankly, if that is included, because we haven't put in there the question of a reasonably safe place to work. I don't think that issue has been raised.

The Court: That was my opinion, but you have asked instructions on that.

Mr. Brobst: That was put in when I was making up the instructions.

The Court: I think, then, we have no debate about anything else in that regard, and I think that proximate cause, or proximate contributing cause, is also coupled with the finding, if there be one, that there was a defect, and that would have to be construed the same way as in an ordinary case.

Mr. Brobst: All right.

The Court: I don't find any difficulty with that. Now, then, as to this measure of damages, I think that I won't give any instruction with reference to the value of money because I think that is asking me to comment on the evidence.

Mr. Brobst: Yes. It wasn't the value of money——

The Court: The earning power of money. According to your Instruction 25, according to the circumstances, they [129] could make an allowance for the earning power of money.

Mr. Brobst: That is based on the actuarial table. Your Honor, the statute says that you are entitled only to the present cash value of the loss of future earnings. I think that is the requirement, and it is not a question of——

The Court: Just a moment. Do you agree to that?

Mr. Gearin: I don't recall the statute, your Honor.

The Court: Have we got the statute here?

Mr. Brobst: I have it in my hotel room. Here is my idea on that: I know the cases hold in death cases if you recover without your actuarial figures being in it will be reversed because that is not the true test of damages. They must make an allowance for the earning power of money, because it would be too high. I mean it is giving the defendant a break, because you invest your lump sum at a 3 per cent interest rate and it cuts down the lump sum to give this widow what she would anticipate per month——

The Court: It seems to me it enters into the field of speculation. What is your suggestion?

Mr. Gearin: Your Honor, I am trying to recall the instruction which your Honor has given in other cases under the F.E.L.A. My impression is that the instruction which your Honor has given, and to which I have never taken exception, is the loss of pecuniary benefits.

Mr. Brobst: It is the present cash value, I think, is [130] the test. We have run into that in other cases which we have had to retry because of it. It

works to the benefit of the defendant, because it cuts down.

The Court: That is what I am trying to get at here. I think it is a minor and immaterial instruction myself because of the fact that I don't think the jury pays a bit of attention to that sort of an instruction. But in order to avoid error I would be pleased if counsel would indicate an instruction that they could agree on.

Mr. Brobst: Your Honor, I think the Guthrie case and that other United States Supreme Court case that I cited in my trial brief states the rule pretty thoroughly, and it is one that we have followed ever since that Guthrie decision in San Francisco.

The Court: Yes, but the Guthrie case has a lot of implications besides that. The Guthrie case didn't arise in this sort of action.

Mr. Gearin: The measure of recovery is the pecuniary benefits reasonably to have been anticipated, benefits of which they have been deprived as a result of the employe's death, such damages being such pecuniary assistance or support as they might reasonably have expected to receive had the employe lived.

The Court: That clause is included in your Instruction No. 27, Plaintiff's 27. [131]

Mr. Gearin: That was my thought, pecuniary benefits.

The Court: And also No. 26.

Mr. Brobst: I don't want it to be raised after-

wards that it was error because it was not the present cash value. That is the thing——

Mr. Gearin: We won't raise that question, your Honor.

Mr. Brobst: That is the thing that concerns me most.

Mr. Gearin: I assure you we won't raise that in this court or any other court.

The Court: With the consent of the defendant, the Court will refuse to give Plaintiff's Instruction 25.

Mr. Gearin: I don't know whether the record is complete. We agree to the withdrawal of the request. We will raise no point on the Court's failure to give it.

The Court: I will make it with the consent of the defendant in that regard. I have the consent of the defendant, so I won't ask for the consent of the plaintiff.

Mr. Brobst: Here is the case. It says: "The true measure of recovery is the present cash value of future benefits of which the beneficiaries were deprived by the death, making adequate allowance according to the circumstances for the earning power of money," citing Chesapeake Railroad vs. Kelley, 241 U.S. 495.

The Court: I don't think that is anything the Supreme Court has the power to control me on, whether I give an instruction [132] in that regard or not. I think myself it is a comment on the evidence. If the Supreme Court wants to take a different view of it, that is all right, but I think it

is a comment on the evidence. I think what they have to consider is adequate compensation for the injury. I think they can take into consideration the earning power of money, and so forth and so on, but I don't think I have to tell them they are going to.

Mr. Brobst: Here was the thing, your Honor, that concerned me about it. The Supreme Court said:

"So far as a verdict is based upon the deprivation of future benefits, it will afford more than compensation if it be made up by aggregating the benefits without taking account of the earning power of the money that is presently to be awarded. It is self-evident that a given sum of money in hand is worth more than a like sum of money payable in the future."

That was the thing that I was afraid of. It raises a question in my mind. Of course, if they waive the error, I don't mind, actually, because the plaintiff has a better break——

Mr. Gearin: Don't worry about me.

The Court: As a matter of fact, I have sat long enough on the Federal Court so that if I thought it was more than adequate I would set it aside.

Mr. Brobst: That is right.

The Court: But if I am satisfied with it, then I am perfectly willing to let the Supreme Court say I was wrong in not giving the instruction. But the defendant has waived that, so I don't see any danger in it anyhow. Besides, I think it gives them a problem that they are not equipped to handle.

That is my notion about it. If I tell the jury what the present value of money means, they are not going to pay any attention to that. If the Supreme Court doesn't like my comments on this thing, I would be very glad if they would reverse it. The thing is chiefly whether I am satisfied with the verdict.

Mr. Brobst: That is all right, then. I just was sure I had some authority someplace for it, or I wouldn't have put it in there.

The Court: A good many times these things that the Supreme Court says in its opinions are for the purpose of guiding the trial court as to whether or not the trial court feels that they have exceeded the measure of compensation that should be awarded in a case. I think that is the expression rather than that we should instruct the jury as to that. In any event, I will exercise my discretion and refuse to give it.

We will take a short recess now.

(Thereupon a recess was taken, after which [134] the jury returned to the courtroom and counsel for the respective parties argued the cause to the jury, and thereupon a recess was taken until 2:00 p.m. of the same day, at which time Court reconvened and the Court instructed the jury as follows:) [135]

Court's Instructions to the Jury

The Court: Members of the jury, you have now heard all the evidence and the arguments of counsel in this case, which is now entitled Mary Edith

Daulton, Administratrix of the Estate of Donald LeRoy Daulton, Deceased, Plaintiff, vs. Southern Pacific Company, a corporation, Defendant. The case was formerly entitled in the name of Agnes B. Thompson as Administratrix, Plaintiff, but that has been changed by agreement of counsel and makes no difference in the determination of the case.

You have the duty and the responsibility of determining the issues of fact which are left in the case, and your determination upon the issues of fact are final and binding. I called your attention to the fact heretofore that you were acting in a judicial capacity and that you really are the judges in the determination of this case.

Now judges are required to decide cases according to the law and the facts. The facts are found in the testimony and the other evidence which you have had presented to you here in court, but in view of the fact that you are not educated as to rules of law the judge is required to state those rules to you.

The Court is going to review the facts for you to [136] settle. It is true that a judge of this Court has a right to indicate how he feels upon a question of fact, and you might attach some importance to that if it were done. But as far as this Court is concerned, this is purely a question which the Court feels you are absolutely competent to decide as to the facts; you are just as competent as the judge to decide them, and I intend to leave to you the determination of the facts. On the other hand, it

is the function of the Court to state the rules of law to you, and so far as the rules of law are concerned they are binding upon the Judge as well as they are upon you, and they are binding on you whether you like them or not. Those are the rules which we must follow. I am not saying that you would disagree with them, because, after all, most rules of law are the outcome of experience with particular situations. But in this case you have some statutes enacted by Congress which are binding upon all of us, as I say, in the determination of these cases.

Now counsel have made arguments before you. You must remember that counsel are advocates. One is employed by the plaintiff and the other is employed by the defendant. Of course, they want to win the case, and they look at things from a partisan angle. We as judges should be impartial, and I want you to remember that that is my attitude in this case. I don't want anything except a fair and impartial determination [137] of the case under the law and the evidence. If you think that I have indicated one way or another any feeling by rulings that I may have made, I advise you now that that is absolutely incorrect. I have not intended to convey to you any idea as to how you should determine the questions of fact, of which you are the final judges.

Now this situation is very well outlined, but I will read you some of these things again which are agreed to by everybody. It is agreed by everybody in this case, and you will accept this as a fact as

far as it goes, that on or about the 6th day of October, 1952, at or near the hour of 3:00 o'clock p.m. thereof, one Donald LeRoy Daulton was employed by defendant as a brakeman working on defendant's eastbound work train, which was moving in an easterly direction on the defendant Southern Pacific's right-of-way and in the vicinity of Wocus, Klamath County, Oregon. At that time Donald LeRoy Daulton and Southern Pacific were engaged in interstate commerce. That is what gives this Court jurisdiction and the right to try this case and why these statutes which I will call to your attention are applicable.

At that time and place it is agreed Donald LeRoy Daulton received injuries which resulted in his immediate death. Also, there are some statements about citizenship which I don't intend to read you, because that likewise has something to do with the question of the right of the Court [138] to try the case.

The plaintiff in this case has a right to bring it as Administratrix of Donald LeRoy Daulton, and no question is raised about that. She has been appointed Administratrix by the State Court.

Now I will read you what the Administratrix contends. This is something, of course, that is incumbent upon her to prove. There are some portions of this which I will call your attention to later. The plaintiff, the Administratrix, contends that on the date mentioned Daulton was standing on the lead footboard of an engine of Southern Pacific when the footboard was improper and unsafe

in that the footboard was so improperly fastened to the steel braces supporting it that the head of a bolt was caused to and did protrude above the surface of the footboard, by reason of which Daulton was caused to fall from the footboard and to receive fatal injuries.

Also, the Administratrix contends that at the same time and place, while Daulton was acting in the course and scope of his duties, the defendant Southern Pacific was careless and negligent in the following respects: That the bolts on the footboard where he was standing were not properly countersunk; that the footboard was unsafe in violation of the Boiler Inspection Act, which I will call your attention to; that Daulton was allowed to ride on the footboard of the [139] engine; that the train was not stopped immediately in accordance with custom and practice when Daulton went out of vision of the other members of the train crew; that the engineer was operating the train and controlling the movements of the train without signals from the train crew; that the engineer was relying upon signals for the movement of his train from the conductor or the rear trainman, whereas the movement of the train should have been controlled by signals from Daulton or the head brakeman; and that by reason of this alleged negligence it is claimed the injuries resulting in his death were received.

Now, the company rules in regard to this have been introduced in evidence, and although certain rules are here specified I think you have a right to consider all the rules which are on the sheet of

paper, Exhibit E, which you will have in your hands in the jury room. The contention of the plaintiff Administratrix is that Rule M, 7-B and 108 are controlling. Likewise, the Administratrix contends that at the time of Daulton's death he left surviving him his widow, Mary Edith Daulton, and two minor children, Gary Wayne Daulton, aged six years, and Virginia Daulton, four years, who were dependent upon him for their maintenance and support.

There is a further contention that at the time of his death Daulton was a well and able-bodied man of the age of 33 years and was earning and receiving from his employment [140] with the Southern Pacific the sum of $575 per month. Now, the facts relating to that are in evidence. There is no question that he was a well and able-bodied man and was of the age of 33 years, and the amounts that he was receiving from the railroad company are in evidence. I think there is a period of ten months involved.

Now there is a division in this which I will call your attention to. The first question which you will have to determine from the facts and under the law as I give you is this: Was the Southern Pacific's engine improper or unsafe in any of the particulars charged and, if so, was such a proximate cause of the death of Daulton. That is the first question.

The second: Was the defendant Southern Pacific guilty of negligence in any particular as charged

and, if so, was such a proximate cause of the death of Daulton.

Then after you determine the question of liability —and you must remember that you must determine liability before you reach any other questions on either of those bases—then you would have to assess the damages, if you found that the defendant Southern Pacific was liable because of anything that has been charged in the contentions of the plaintiff.

Now we start with the proposition that this is not fully explained in any respect as to just exactly how this happened, how this fatal injury came about. From that viewpoint, if you didn't know anything more than that, obviously [141] there could not be any recovery here because there can be a recovery only on the ground of some fault, something that the Southern Pacific or its employes should have done that they didn't do. So if we start with that point, if you find that it was an accident, pure and simple, and that neither Daulton, the deceased, nor the employes of the railroad were negligent, and that the engine was properly maintained, there then could not be any recovery. There must be a finding someplace of some fault, because the Southern Pacific would not be liable because the death occurred on its premises or as a result of something that happened on its premises. The Southern Pacific is not an insurer of its employes. That is, you cannot simply say because of the death, no matter who is dependent upon Daulton, that that is something the Southern Pacific must pay for.

Likewise, Daulton was responsible for his own actions, and if the death was a result of his own actions, without the direction of anyone or without the compulsion of some rule or direction of the superior employes, and he was acting voluntarily under the circumstances, and as a result of his own fault, which was not necessarily a part of his duties, if he fell from the train in that way and the railroad was not guilty of having an engine which was in improper condition or if it was not guilty of any of the other acts which are charged or omissions which are charged, then, of course, [142] his Administratrix could not recover.

Therefore, we start with the proposition that it is necessary for the plaintiff to prove by a preponderance of the evidence that there was something wrong with what the railroad did in the particulars alleged; namely, that there was a violation of the Act, or there was negligence of its employes in some other particular, because, of course, the railroad, the Southern Pacific, acts only through its employes, and of course their actions or omissions are chargeable to it. But the plaintiff must prove, in order to have a basis to establish liability, that some of these contentions are established by a preponderance of the evidence.

Now it is not necessary that there be proof amounting to demonstration or beyond a reasonable doubt, but simply by the greater weight of the evidence, the evidence as a whole.

Furthermore, even though the decedent Daulton was acting on his own, you must remember that,

being engaged in the performance of his duty, there is a presumption that he was exercising due care for his own safety at the time of his death, because there is no presumption that he was acting negligently. Also, you must remember that that applies to the employes of Southern Pacific; that there is a presumption that they were acting properly and exercising due care at the time that the accident happened, unless the plaintiff has proved [143] to the contrary.

By a preponderance of the evidence is meant such evidence as when weighed with that opposed to it has more convincing force, and from which the result is that the preponderance is in favor of the party on whom the burden rests.

Now this situation, as I said before, is divided into two parts, and the parts are indicated by the issues which the parties have agreed upon:

Was defendant's engine improper or unsafe in any of the particulars charged and, if so, was that a proximate cause of the death of the deceased? You remember the deceased is Daulton.

In that respect there is an enactment by Congress which provides that a locomotive, and all parts and appurtenances thereof, must be in proper condition and safe to operate in the service to which the same are put. That of course includes the footboard. And, furthermore, that the engine and all its parts and appurtenances, including the footboard, may be employed in active service of the Southern Pacific without unnecessary peril to life or limb.

Now, liability for failure to obey the above sec-

tion is absolute, regardless of negligence on the part of the railroad company or contributory negligence on the part of the decedent Daulton. If you find there was a violation of this [144] Act which contributed proximately to the cause of death of Donald L. Daulton, then you could find that there was a matter for your consideration which would establish liability on that ground alone, because it is the absolute duty under that section to keep the locomotive and its parts and appurtenances, including the footboard, in proper condition, and if they were not in such condition then you might find liability upon the part of the railroad company, irrespective of whether you found that the railroad, Southern Pacific, exercised ordinary and reasonable care with regard to this, because this does not fall within the doctrine of reasonable care; this is simply on the question of absolute liability.

Now, in the first place, you must find as a fact such condition, and here the contention is that the unsafe condition was caused by the protuberance of a bolt on the footboard. There is a conflict in the evidence there. There is evidence from which you might conclude that the bolt was not there and did not protrude at the time of the accident; that there was an entirely different footboard on there. On the other hand, there is some evidence from which you might conclude that the bolt was there in the condition that you saw in some of the pictures introduced by plaintiff, and that it did protrude at the time of the accident. One of the things you have to determine, then, is what was the con-

dition of the footboard at the time of the accident. That is a pure question [145] of fact on which the Court certainly indicates no opinion. You heard the evidence about it, and you can make up your minds about that.

In the next place, in order to establish liability you would have to find that that rendered the engine or part of the engine unsafe. Again, that is a question of fact, because it has to be in violation of this section, which says in order to establish liability it is a question whether it was in proper condition and safe to operate in the service in which the same was put, or that it could be employed without unnecessary peril to life or limb. Those are the questions of fact upon that feature of it.

Once it is established in the first place that it existed, and, in the second place, that it violated these sections of the statute that I just read to you, or clauses of the statute that I just read to you, then absolute liability would be established for that purpose.

That carries over into the field of negligence, which I will discuss next. In the field of negligence, if they violated the statute, that also would establish negligence upon the part of the railroad company. But, as I say, there are two questions of fact for you first to determine. Then even though you find that negligence or this liability is established, you still have to find, before there can be any recovery, that the particular defect, if you find there was [146] one, was a proximate contributing cause to the death of Daulton. So you see there is

another question of fact that you would have to determine on that score.

Now, in order that I shall not forget, I want to say at this time that if you find that condition did exist and that it was a contributing cause to the death, then the Act provides that there should be no consideration given to contributory negligence of Daulton under those circumstances. Even if you found he was contributorily negligent, that would not be a defense if you have made these other determinations and have found that the situation did exist, that it was a contributing proximate cause to the death, and that death resulted in part from that.

Now, I will turn to the other phase of the thing: Was the defendant Southern Pacific guilty of negligence in any of the particulars as charged and, if so, was such a proximate cause of the death of the deceased?

You will remember that the particulars are these: That Southern Pacific was careless and negligent in the following respects: That the bolts in the footboard where Daulton was standing were not properly countersunk; that the footboard was unsafe, in violation of the Act which I just read to you; that Daulton was allowed to ride on the footboard of the engine; that the train was not stopped immediately in accordance with the custom and practice when the deceased went out of the [147] vision of the other members of the train crew; that the engineer was operating the train and controlling the movements of the train without signals from the

train crew; that the engineer was relying upon signals for the movement of his train from the conductor or rear trainman, whereas the movement of the train should have been controlled by signals from the deceased Daulton or the head brakeman.

Now the statute, of course, permits this action to be maintained under these circumstances for negligence where negligence is claimed. And, as I said before, the entire footboard matter in this case must be proven by plaintiff by a preponderance of the evidence.

Negligence is the omission to do something which an ordinary, reasonable and prudent person would have done under the same circumstances, or the doing of something which an ordinary, reasonable and prudent person would not have done under the same circumstances at the time and place. You must also consider the time, place and circumstances in determining whether an action or an omission is negligent. The rule is what an ordinary and prudent person would have done, exercising ordinary care, under the circumstances. By "ordinary care" we mean that degree of care which an ordinary, careful and prudent person would have exercised under the same circumstances, and the failure upon the part of any person to exercise that degree of care constitutes [148] negligence.

Now it has been admitted, of course, that this injury and death occurred under these circumstances, so now we have to consider, besides the matters which I have given you with regard to the footboard and in connection with that under this

charge of negligence, also whether or not the employes of the railroad under these circumstances—that is, the engineer, the rear brakeman, and all the other employes of this railroad present at the time and place—were guilty of negligence in any of the particulars alleged here. That, of course, is a question of fact. You have heard about it, and you know just what the engineer did.

I will say in this regard that the rules have been introduced here. The rules do not specifically cover this situation. None of the rules specifically cover this exact situation, but that does not relieve the railroad of the duty of exercising ordinary care such as a reasonable and prudent person would have exercised under the circumstances. You have to consider these employes and what they did and determine whether or not the plaintiff has proved by a preponderance of the evidence that they were negligent in any of these particulars.

The next thing you have to find is, if there was negligence, that it contributed proximately to the death of the deceased Daulton. If you find the defendant was guilty [149] of any negligence as contended by the Administratrix, and that this negligence proximately contributed to the death of Donald L. Daulton, deceased, then you could find liability.

You must remember in regard to this that no employe such as Daulton is held to have assumed the risks of his employment in any case where the death resulted in whole or in part from the negligence of any of the employes of Southern Pacific. The plain-

tiff need not prove, in order to recover, that the negligence of the defendant or its servants, if you find there was any, was the sole proximate cause of the death of Daulton. The railroad is liable for the death, even though its negligence, if any, was only a contributing proximate cause. But where the railroad has committed no negligent act or its employes have committed no act that constitutes any part of the causation, the defendant would then be free from liability. In other words, if you should find a situation where you could say that Daulton by his own act, independent of any other circumstances, caused his own death, then of course the railroad would not be liable for that.

After you are through with these various phases and you make these determinations of fact, if you have found that the railroad is liable under the law, then you get down to a consideration of what damages should be allowed. In order that you may have the situation before you to determine that question, if you arrive at it, I must instruct you upon [150] that, too. But the mere fact that I give you instructions on damages does not mean that I am trying to decide the first questions of fact which I have already submitted to you. That is for you.

If you do arrive at the point where you find the railroad liable, then you may consider the question of damages, and I will give you the rules in that regard. You are to consider as a measure of recovery, if you find the railroad liable, only such sum of money as will compensate the plaintiff Administratrix for the pecuniary loss suffered by the bene-

ficiaries of Daulton, and the Administratrix is not to be enriched nor is the defendant to be punished in the imposition of damages, because damages are based upon the theory of compensation; not upon apparent need or the ability of Southern Pacific to pay.

By pecuniary loss is meant either a loss arising from the deprivation of something to which the beneficiaries of Daulton would have been legally entitled if he had lived, or a loss arising from a deprivation of benefits which from all the circumstances it can be believed with reasonable certainty the beneficiaries would have received from Daulton had his life not been taken. Such damages should, of course, be calculated in reference to the reasonable expectation of life of Daulton and of his earning power.

Now, there has been a life and mortality table received [151] in evidence, and likewise certain computations were permitted in evidence as if the actuary had been called to testify to them. These are not binding upon you, but are only given to you as guides whereby you might arrive at a proper measure of damages which will fit in with the instructions in that regard.

In determining the value of the contributions which Daulton might have made to his dependents had he lived, the measure of such recovery is the present-day cash value of future benefits, the pecuniary interest that the widow might have obtained during Daulton's life, and likewise the reasonable expectation of his children, as to what he might

have contributed to them during the period especially of their minority, but without limitation in that regard. You may include in your consideration in regard to the children the loss of nurture, instruction, training and care of which such children, in your opinion, have been deprived.

Now, I am sure that this jury do not need any instructions as to some of the matters which I am going to just mention. In other words, do not arrive at a quotient verdict, because I would have to set that aside. That would be illegal. That is, do not arrive at a verdict by any mathematical formula, by taking a poll of the jury, what each thinks, and then adding them up and arriving at some mathematical computation. That is not the way you are to get at this [152] thing. The way for you to do is for each of you to make up his own mind, when you come to the question of damages, what you think should be given and then argue it out among the others. You have to finally convince every member of the jury that a certain sum is correct according to the instructions and your judgment in the matter. In other words, don't follow any short-cuts in arriving at a verdict. Just argue it out among yourselves and try to arrive at a proper result.

Of course, likewise, I don't need to say that you are not to consider what might be given under State law or some other law of compensation under certain circumstances to these people, or anything of the sort. You are to determine this strictly upon the question of whether or not there is liability

under the instructions I have given you and then turn to the question of damages, and on the question of damages follow the rules that I have given you. Of course, that cuts out of your consideration any possibility of some other statute or some other jurisdiction or some other law under which compensation might be given to them. I don't want to bring your attention to what those might be. This is tried in a very narrow channel, and these instructions that I give you show you what the limits are and what you are governed by, first on the question of liability and then on the question of damages. [153]

Also, you know well enough that you are not to be affected by sympathy for these people. Unquestionably sympathy is due them, but in trying to solve these questions of fact which come up you should not resolve it on that basis; not on the basis of sympathy but on the facts.

There is one factor that I have mentioned in regard to this. That is the factor of contributory negligence. Contributory negligence is not a defense in this case at all. As you will remember from what I said in the first part of the instructions, contributory negligence will not be considered at all if you find that there was a violation of the statute with reference to the condition of the engine or the footboard. If you find that, you won't consider contributory negligence at all, if you find that that was a proximate cause of the death. On the other hand, if you find simply that there was a negligent condition, and that the railroad was guilty of negligence in some of the particulars in evidence, and that was

a proximate cause, then in that regard you have a right to consider the conduct also of the decedent Daulton. If you find that he was contributorily negligent to a certain extent, then you can consider that in setting up the measure of damages.

Now I have given you the measure of damages for the full amount. Now I am taking up a consideration of damages based upon this determination alone with regard to the negligence [154] of the railroad and proximate cause, and if you also find that Daulton was contributorily negligent then you would not award the full amount to the Administratrix, but you would cut it down in accordance with the principles that I am about to announce to you.

It is your duty as jurors to determine how much Daulton's lack of care contributed to the cause of the accident. If Daulton's negligence caused his death to the extent of one-third thereof, then the Administratrix' damages, if any, should be reduced by one-third. If Daulton's negligence contributed to his death to the extent of one-half, then the Administratrix' damage should be reduced by one-half. If Daulton's negligence contributed to his death to the extent of three-fourths, then the Administratrix' damages should be reduced by three-fourths. So, in the first place, you determine the whole thing, as if the negligence, if you find any, was the sole proximate cause of the death and not contributed to by Daulton at all. Then if Daulton was found to be contributorily negligent, you will reduce it according to the formula that I have just given you.

But you must remember that if Daulton was solely at fault, and no negligence on the part of the railroad contributed to his death, then you would not permit any recovery at all and you would not arrive at any consideration of damages. [155]

Now you are the sole and exclusive judges of the facts and of the weight and sufficiency of the evidence. You are not bound to decide in accordance with the testimony of any number of witnesses which does not produce conviction in your minds as against a less number. The direct evidence of one witness who is entitled to full credit and belief is sufficient to establish or prove any fact in this case if you extend credit to him. In other words, you are the sole judges of the credibility of all these witnesses. You have the power to determine in your own minds how much of the truth they are telling and if they are influenced by any exterior motivations. Also, you have a right to consider the opportunities they had for observation. All of these things lend themselves to a consideration of the questions of fact which are before you.

If you find that any witness has testified falsely in any one material part of his testimony, you have a right to consider that in determining what credit you should give him in other respects. If you find that any witness has testified willfully falsely with regard to any factor in this case, then you have a right to entirely disregard his testimony if it has not been corroborated by other evidence which you do believe. But, as I have said before, you are the sole and exclusive judges of the facts and of the

credibility of all witnesses, and your power of judging is [156] supreme in that regard and you are responsible for it.

It is with entire confidence that I submit this question to you, Ladies and Gentlemen, but at this time, before I finally submit it, the rules which I am governed by direct that I give counsel an opportunity to raise questions of law, so I will now excuse you for a few minutes and then I will bring you back and submit the case to you for determination.

(Thereupon the jury retired from the courtroom in custody of the Bailiff, and thereafter the following occurred out of the presence and hearing of the jury:)

The Court: Any exceptions, Gentlemen?

Mr. Brobst: There is only one, your Honor. That was the question of the instruction on contributory negligence. I believe under the circumstances, where the law conclusively presumes that the plaintiff was in the exercise of ordinary care, there being no evidence in the record to the contrary or that he did any act that could be construed as an act of contributory negligence, the instruction should not have been given.

The Court: I don't know what the jury is going to find about that. If I went into the question of negligence on either side and had not gone into that, I would think I was not following the rule that is laid down for me. I think [157] that applies to contributory negligence just as much as it does to negligence. The Supreme Court, as I understand it,

has said these are jury questions, and I am going to submit both of them.

Mr. Brobst: I just read one case the other day where that instruction was given, and the Court said it should not have been given because there was no actual eye-witness to the accident, and in view of those facts it was conclusively presumed that he was in the exercise of ordinary care.

The Court: I think it is conclusively presumed, also, that the employes of the railroad are in the exercise of ordinary care. I won't give it, anyhow. I think these are jury questions; and if you are going to submit one side, you have to submit the other.

Mr. Gearin: If the Court please, the defendant objects to the Court submitting to the jury the issue of fact with regard to an alleged violation of the Boiler Inspection Act on the ground and for the reason that there is no evidence that the locomotive was defective in any particular or in violation of the Act, or that such violation, if it existed, constituted a proximate contributing cause of the death of the deceased.

The Court: I think that is another one. Is everybody satisfied?

Mr. Gearin: With that exception, yes. [158]

Mr. Brobst: I would like my exception.

The Court: Oh, yes, surely. Recall the jury.

(Thereupon the jury returned to the court-room and the following further proceedings were had:)

The Court: Members of the jury, the Court is

about to submit this case to you on the evidence which is before you and the instructions which the Court has now given you. In the event that you find the plaintiff is entitled to recover under the evidence and the instructions, then you will use this form of verdict, which, omitting the formal portions, reads as follows: "We, the jury in the above-entitled action, find in favor of the plaintiff and against the defendant Southern Pacific Company and assess damages in the sum of blank dollars. Dated this blank day of August, 1955." Then there is a blank line, "Foreman."

If you use that form of verdict, of course, you will have found liability under the instructions, and you will also follow the instructions with regard to the amount that you assess as damages and take into consideration all the instructions given on that point.

Upon the other hand, if you find that the defendant was not liable, you will use this form of verdict: "We, the jury duly empaneled and sworn to try the above-entitled cause, do find our verdict in favor of the defendant and [159] against the plaintiff. Dated this blank day of blank, 1955," and a blank line, "Foreman."

Since this case is tried in the Federal Court, Ladies and Gentlemen, you will find it necessary to arrive at a unanimous verdict. In other words, a verdict to all parts of which all of you agree. Be very careful about that, because when you come back here you probably will be asked whether you agree to the verdict or not. So if a verdict were

returned without the unanimous concurrence, it might create a difficult situation. Therefore, carefully check up to see before you return any verdict at all that you are all in agreement with the verdict.

The verdict will be signed, however, by the foreman alone. This is not like a case in the State Court, where less than the full number can agree on a verdict. In this court it is necessary that all the jurors agree to every factor involved in the finding of a verdict.

You will have with you in your jury room the exhibits which have been introduced in the case and these two forms of verdict, which you will use in the determination of the facts in the case.

If there is nothing further, I will now excuse you in order to deliberate on a verdict.

Swear the Bailiff.

(The Bailiff was thereupon sworn, and [160] the jury retired to consider of its verdict.)

[Endorsed]: Filed December 19, 1955.

[Endorsed]: No. 14924. United States Court of Appeals for the Ninth Circuit. Mary Edith Daulton, Administratrix of the Estate of Donald LeRoy Daulton, deceased, Appellant, vs. Southern Pacific Company, a corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed: December 14, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14924

MARY EDITH DAULTON, Administratrix of the Estate of Donald LeRoy Daulton, deceased,
Appellant,

vs.

SOUTHERN PACIFIC COMPANY, a corporation,
Respondent.

STATEMENT OF POINTS

Appellant relies upon the following points for a reversal of the judgment herein.

(a) That defendant failed to disclose at the pretrial the defense that the pictures plaintiff intended to use at the trial were not pictures of the footboard involved in the accident.

(b) That the Trial Court was in error in limiting argument of counsel for plaintiff.

(c) That the Trial Court was in error in instructing with reference to negligence and contributory negligence upon the part of the deceased, there being no evidence upon which to base such instructions.

(d) Prejudicial comment of the Trial Judge with reference to one of plaintiff's expert witnesses.

(e) Failure of the Trial Judge to properly explain the Federal Employers' Liability Act.

HILDEBRAND, BILLS & McLEOD

/s/ By D. W. BROBST,

Attorneys for Appellant

Affidavit of Service by Mail attached.

[Endorsed]: Filed January 12, 1956. Paul P. O'Brien, Clerk.

No. 14,924

United States Court of Appeals

For the Ninth Circuit

MARY EDITH DAULTON, Administratrix of the Estate of Donald LeRoy Daulton, deceased,

Appellant,

vs.

SOUTHERN PACIFIC COMPANY, a corporation,

Appellee.

APPELLANT'S OPENING BRIEF.

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No. 14,924

United States Court of Appeals
For the Ninth Circuit

MARY EDITH DAULTON, Administratrix of the Estate of Donald LeRoy Daulton, deceased,
Appellant,

vs.

SOUTHERN PACIFIC COMPANY, a corporation,
Appellee.

APPELLANT'S OPENING BRIEF.

STATEMENT OF JURISDICTION.

This is an appeal from a judgment of the United District Court for the District of Oregon entered on a verdict of a jury in an action founded upon the Federal Employers' Liability Act (U.S.C.A. Title 45, Sec. 51 et seq. and Sec. 23 et seq.). Jurisdiction of the District Court rested upon U.S.C.A. Title 45, Sec. 56 and the jurisdiction of this Court upon appeal is conferred by U.S.C.A. Title 28, Sec. 1291.

STATEMENT OF THE CASE.

This action was brought under the provisions of the Federal Employers' Liability Act U.S. Code Annotated Title 45, Sec. 51 et seq. and Sec. 23 et seq.

The plaintiff, Mary E. Daulton, is the widow and administratrix of the estate of Donald LeRoy Daulton, deceased. The deceased Donald LeRoy Daulton was a brakeman employed by the defendant near Wocus, Oregon, a siding about two and one-half miles north of Klamath Falls, Oregon.

By the pre-trial order which supersedes the pleadings in this action, it was determined that the deceased, while engaged in his work as a brakeman on the 6th day of October, 1952, suffered injuries which caused his death.

(P.T.* page 15 and page 16.)

The deceased, at the time of his death, was riding on the front footboard of an engine that was pulling the cars of a work train. The plaintiff's contentions, as contained in the pre-trial order were:

(1) That the footboard on which plaintiff was riding was unsafe in that the head of the bolt used to fasten the footboard to a bracket protruded above the surface of the footboard constituting a violation of the Federal Boiler Inspection Act, 45 U.S.C.A. 23;

(2) That the train was not stopped immediately in accordance with the custom and practice when deceased disappeared from the view of other members of the train crew;

(3) That the engineer was operating and controlling the train without signals from the train crew; and

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*P.T. refers to Printed Transcript.

(4) That the engineer relied on signals from the conductor or other trainmen instead of from the deceased or head brakeman; and

(5) That the aforesaid conduct caused deceased to receive injuries from which he died.

(P.T. page 17.)

The defendant railroad, by the pre-trial order, denied that it was guilty of negligence or any act or omission that was the proximate cause of the death of the deceased.

(P.T. page 19.)

The cause was then tried as to the liability of the defendant upon two issues framed and stated in the pre-trial order:

(1) Was defendant's engine improper or unsafe in any particulars charged and, if so, was such unsafe condition a proximate cause of the death of the deceased?

(2) Was the defendant guilty of negligence in any particular as charged and, if so, was such a proximate cause of the death of the deceased?

(P.T. page 19.)

The jury returned a verdict in favor of the defendant upon which judgment was entered. A motion for new trial was subsequently made and denied.

(P.T. page 27.)

SUMMARY STATEMENT OF EVIDENCE AND PLAINTIFF'S THEORY FOR A RECOVERY.

We will here summarize what evidence we feel to be essential for a determination of the issues here involved.

The deceased was a brakeman employed by the defendant and at the time of his death was engaged in his employment on a work train at a point about one mile south of Wocus, Oregon.

(P.T. page 46.)

The work train was moving north toward Wocus for the purpose of proceeding into a siding so that two approaching trains could pass.

(P.T. page 47.)

There were welders working alongside of the track that the work train would have to pass.

(P.T. page 46.)

The deceased was the head brakeman and it would have been his duty to have lined the switch when the train reached it so that the work train could have entered the siding.

(P.T. page 48.)

He rode on the front right footboard of the engine. The conductor or the engineer, depending where the brakeman was located, were in charge of telling the men where to ride.

(P.T. page 51.)

The purpose for Mr. Daulton to be on the front of the train, in addition to letting the train into the siding, was to pilot the train by the welders.

(P.T. page 51, page 52.)

When the train was about forty car lengths from the switch deceased went out of sight of the engineer.

(P.T. page 116.)

All the witnesses who were working for the defendant in an operating capacity, except the engineer who stated he did not know of such a custom (P.T. page 122, page 123) and the superintendent of the Southern Pacific, testified that the train should have been stopped immediately when the deceased went out of sight of the engineer.

The engineer continued on after the deceased had disappeared up to a point approximately a car to two car lengths south of the switch.

(P.T. page 49.)

When the signal did not change indicating that the switch had not been lined for the train to proceed into the siding a search was begun to find out what had happened to Daulton whose duty it was to have lined the switch for the movement.

(P.T. page 124.)

He was found under the front trucks of the engine tender.

(P.T. page 49.)

And his personal effects were scattered along the track for about three to four car lengths or in the neighborhood of one hundred feet.

(P.T. page 49.)

The train could have been stopped in from ten to fifteen feet.

(P.T. page 51.)

Upon the above facts, plaintiff's theory of responsibility on the part of the defendant was based upon a violation of the Federal Boiler Inspection Act and the failure of the engineer to stop in accordance with custom and practice when the deceased disappeared from the view of the engineer. There were no witnesses to what actually happened. It was plaintiff's contention pursuant to the above issues which were contained in the pre-trial order that deceased tripped or slipped on the bolt that allegedly protruded from the footboard and fell or, not having done that, in some manner lost his balance some thirty-seven car lengths before he was killed, held on until finally some one hundred feet before the train stopped he fell under the wheels and was dragged and sustained injuries that resulted in his death. The personal effects extended in a southerly direction from his body for approximately one hundred feet. The train could have been stopped when the deceased disappeared from the sight of the engineer in a distance of not over fifteen feet which would have been some thirty-seven car lengths from where his personal effects were first found. Thus, the jury could have found the defendant railroad liable for a violation of the Boiler Inspection Act which was a proximate cause of deceased's death; or the jury could have found that a proximate cause of deceased's death was the negligence of the defendant because the train was not stopped immediately by the engineer upon the disappearance of the deceased from his view; for had the train been stopped the deceased would not have

been killed as the train traveled about thirty-seven car lengths before there was any evidence of the deceased having been injured.

ERRORS RELIED UPON FOR REVERSAL OF JUDGMENT.

The points relied upon by the defendant for a reversal of the judgment and the order in which they appear in the argument below are as follows:

1. The Trial Court erroneously instructed with reference to the contributory negligence of the deceased which was without evidentiary support and not an issue presented by the pre-trial order, as follows:

(a) "Likewise, Daulton was responsible for his own actions, and if the death was a result of his own actions, without the direction of anyone or without the compulsion of some rule or direction of the superior employes, and he was acting voluntarily under the circumstances, and as a result of his own fault, which was not necessarily a part of his duties, if he fell from the train in that way and the railroad was not guilty of having an engine which was in improper condition or if it was not guilty of any of the other acts which are charged or omissions which are charged, then, of course, (142) his Administratrix could not recover."

(P.T. p. 162.)

(b) "In other words, if you should find a situation where you could say that Daulton by his own act, independent of any other circum-

stances, caused his own death, then of course the railroad would not be liable for that."

(P.T. p. 169.)

(c) "There is one factor that I have mentioned in regard to this. That is the factor of contributory negligence. Contributory negligence is not a defense in this case at all. As you will remember from what I said in the first part of the instructions, contributory negligence will not be considered at all if you find that there was a violation of the statute with reference to the condition of the egnine or the footboard. If you find that, you won't consider contributory negligence at all, if you find that that was a proximate cause of the death. On the other hand, if you find simply that there was a negligent condition, and that the railroad was guilty of negligence in some of the particulars in evidence, and that was a proximate cause, then in that regard you have a right to consider the conduct also of the decedent Daulton. If you find that he was contributorily negligence to a certain extent, then you can consider that in setting up the measure of damages.

Now I have given you the measure of damages for the full amount. Now I am taking up a consideration of damages based upon this determination alone with regard to the negligence (154) of the railroad and proximate cause, and if you also find that Daulton was contributorily negligence then you would not award the full amount to the Administratrix, but you would cut it down in accordance

with the principles that I am about to announce to you."

(P.T. p. 172.)

(d) It is your duty as jurors to determine how much Daulton's lack of care contributed to the cause of the accident."

(P.T. p. 173.)

(e) "But you must remember that if Daulton was solely at fault, and no negligence on the part of the railroad contributed to his death, then you would not permit any recovery at all and you would not arrive at any consideration of damages. (155)"

(P.T. p. 174.)

The foregoing instructions were excepted to by appellant.

"The Court. Any exceptions, Gentlemen?

Mr. Brobst. There is only one, your Honor. That was the question of the instruction on contributory negligence. I believe under the circumstances, where the law conclusively presumes that the plaintiff was in the exercise of ordinary care, there being no evidence in the record to the contrary or that he did any act that could be construed as an act of contributory negligence, the instruction should not have been given."

(P.T. p. 175.)

2. The Trial Court committed prejudicial error in limiting argument of counsel for appellant.

3. Error was committed by reason of the failure of the defendant to disclose by the pre-trial order that

pictures to be used by plaintiff and appellant were not pictures of the engine footboard involved in the accident.

4. The Trial Court committed prejudicial error by commenting upon the testimony of an expert witness called by appellant.

(P.T. p. 179.)

ARGUMENT.

(a) THE COURT ERRONEOUSLY INSTRUCTED THE JURY WITH REFERENCE TO CONTRIBUTORY NEGLIGENCE OF THE DECEASED WHICH WAS NOT AN ISSUE IN THE CASE.

There were only two issues with reference to the liability phase of the case that were framed by the pre-trial order for determination of the jury. They were:

(1) Was defendant's engine improper or unsafe in any of the particulars charged and, if so, was such a proximate cause of the death of the deceased?

(2) Was the defendant guilty of negligence in any particular as charged and, if so, was such a proximate cause of the death of the deceased?

Yet, the Trial Court instructed the jury as follows:

> ". . . In other words, if you should find a situation where you could say that Daulton by his own act, independent of any other circumstances, caused his own death, then of course the railroad would not be liable for that."
>
> (P.T. page 169.)

"But you must remember that if Daulton was solely at fault, and no negligence on the part of the railroad contributed to his death, then you would not permit any recovery at all and you would not arrive at any consideration of damages."

(P.T. page 174.)

In between the above quoted instructions the Court included in its charge on damages the element of contributory negligence.

(P.T. page 172, page 173.)

And stated:

"It is your duty as jurors to determine how much Daulton's lack of care contributed to cause the accident."

(P.T. page 173.)

The same instruction was given in the Court's preliminary remarks.

"Likewise, Daulton was responsible for his own actions, and if the death was a result of his own actions, without the direction of anyone or without the compulsion of some rule or direction of the superior employees, and he was acting voluntarily under the circumstances, *and as a result of his own fault* (emphasis added) which was not necessarily a part of his duties, if he fell from the train in that way . . . his administratrix could not recover."

(P.T. page 162.)

Where there are no witnesses to the conduct of a deceased person in a wrongful death action the de-

ceased is, as a matter of law, presumed to have been in the exercise of ordinary care and consequently free of contributory negligence.

"To this evidence must be added the presumption that the deceased was actually engaged in the performance of those duties and exercised due care for his own safety at the time of his death. *Looney v. Metropolitan R. Co.,* 200 U.S. 480, 488, 50 L. Ed. 564, 569, 26 S.C. 303; *Atchison, Topeka & S.F.R.Co. v. Toapo,* supra (281 U.S. 356, 74 L. Ed. 900, 50 S.C. 281); *New Aetna Portland Cement Co. v. Hatt* (C.C.A. 6th) 231 Fed. 611, 617, 13 N.C.C.A. 334."

Tennant v. Peoria & Pekin Union R. Co., 321 U.S. 29, 88 L. Ed. 520, cited with approval in *Miller v. Southern Pacific Co.,* 117 Cal. App. 2d 492.

Exception was taken to the above instructions.

"The Court. Any exceptions, Gentlemen?

Mr. Brobst. There is only one, your Honor. That was the question of the instruction on contributory negligence. I believe under the circumstances, where the law conclusively presumes that the plaintiff was in the exercise of ordinary care, there being no evidence in the record to the contrary or that he did any act that could be construed as an act of contributory negligence, the instruction should not have been given."

(P.T. page 175.)

In addition to the fact that the instructions dealing with contributory negligence of the deceased being outside the issues of the pre-trial order and being

contrary to the law, they were prejudicially erroneous as worded. In each of the above quoted instructions the court assumes that the deceased was himself at fault. For, nowhere in the quoted instructions was the jury advised that they must find *from a preponderance of the evidence* that the deceased was at fault. In fact, the last and most prejudicial instruction definitely told the jury that the deceased did not use ordinary care.

> "It is your duty as jurors to determine how much Daulton's lack of care contributed to cause the accident."
>
> (P.T. page 173.)

This was in direct contravention of the law which presumes, in the absence of evidence as to how the accident actually occurred, that the deceased was in the exercise of ordinary care.

> *Tennant v. Peoria & Pekin Union R. Co.,* supra.

There was no issue in the pre-trial order presenting the defense of fault or contributory negligence upon the part of the deceased.

Clearly instructing on matters outside of the issues and in conflict with the legal presumption was error of a most serious nature and highly prejudicial. In the case of *Barry v. Reading Company,* 3 F.R.D. 305, the Court would not instruct on the question of negligence where the sole contention set up in the pre-trial order was that liability was based on a defective brake. It was held there that the instruction

should not be given because it was not an issue contained in the pre-trial order.

> "In the case of *Geopalos v. Mandes,* D.C. 35 Fed. Supp. 276, the court said:
>
> 'It is well recognized that pre-trial proceedings are for the purpose, among other things, of simplifying issues and eliminating those which are not relied upon' ".

Again, where the issues to be determined in an action were settled in a pre-trial conference, the issues there contained thereafter controlled the case and the Court refused to give instructions inconsistent with the two issues of the pre-trial order. The Court there said:

> "At a pre-trial conference the issues in the case were discussed and set forth in a pre-trial order which under the rule controlled the case...."
>
> *Bryant v. Phoenix Bridge Co.,* 43 Fed. Supp. 162.

.The pre-trial order having set forth the two issues involved in this action and there being no issue raised of contributory negligence or negligence upon the part of the deceased, it was clearly prejudicial error to give the foregoing instructions.

> "This Court has held that: 'An instruction which would allow the jury to render a verdict on an issue not of the pleadings is erroneous'. In 53 Am. Jur. Trial Sec. 574 p. 452 a related rule is stated as follows: 'It is a well settled general principle that the instructions given by the trial court should be confined to the issues

raised by the pleadings in the case at bar and the facts developed by the evidence in support of those issues or admitted at the bar.' See also, 64 C.J. Trial Sec. 651, p. 745. . . ."

Ellis v. Union Pacific R. Co., 27 N.W. 2d 921.

"It is clearly prejudicial error for the court to inject into a case an issue or question not raised by the pleadings or the evidence, if it would tend to confuse the questions properly in the case and mislead the jury to the prejudice of appellant."

Doering v. City of Cleveland, 114 N.E. 2d 273.

There was added emphasis to this error for the Court instructed that plaintiff had to prove the liability by a preponderance of the evidence.

"But the plaintiff must prove, in order to have a basis to establish liability, that some of these contentions are established by a preponderance of the evidence."

(P.T. page 162.)

The negligence, if any, of the deceased, contributory or otherwise, if it had been made an issue by the pre-trial order, would have constituted an affirmative defense to be established by the defendant by a preponderance of the evidence. The Court gave no instruction requiring the defendant to prove negligence, if any, upon the part of the deceased. The Court, as set out above, simply told the jury that contributory negligence, if it was the sole cause of the death of Donald LeRoy Daulton, would prevent a recovery by the plaintiff. Plaintiff then, in accordance with the given instruction, was actually required to prove her

case as to the violation of the Federal Boiler Inspection Act and failure to observe a custom and practice, by a preponderance of the evidence; and, in addition, she had the burden of proving that deceased was free from negligence. There was no affirmative defense put in issue by the pre-trial order, consequently the plaintiff had the burden of establishing liability in accordance with the issues, and by the erroneous instructions she was required to prove the deceased free from fault. It is urged that this erroneous sequence of instructions dealing with a subject outside the issues presented by the pre-trial order prevented plaintiff from having a fair trial and that the judgment should be reversed.

(b) THE TRIAL COURT WAS IN ERROR IN LIMITING ARGUMENT OF COUNSEL.

Rule 51 of the Federal Rules of Civil Procedure provides:

> "At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury. . . ."

The obvious reason for this rule is so that counsel can intelligently present to the jury his side of the case in the light of the facts and law. It is a recognized rule that argument of counsel is supposed to

present the issues, *the applicable law,* (emphasis added) and the pertinent evidence.

"In the trial of cases to a jury in the federal courts, the arguments of counsel must be confined to the issues of the case, *the applicable law,* (emphasis added) the pertinent evidence, and such legitimate inferences as may properly be drawn therefrom."

London Guarantee & Accident Co. v. Woelfle, 83 Fed. 2d 325;

Chicago & N.W.Ry. Co. v. Kelly, 84 Fed. 2d 569.

"Nor is there any merit in the contention that counsel for plaintiff was permitted to make improper argument to the jury when after discussing some of the evidence he said: 'I think the Court will instruct you as to the law.' Objection was then made, and the argument is that counsel should not be permitted to tell the jury what the Court would instruct them as to the law. It is entirely proper for counsel to say in his argument that he thinks the Court will instruct the jury—stating the law which he thinks the Court will give."

Nuins v. Mutual Ben. Health Co. Accident Assn., 319 Ill. App. 239, 48 N.E. 2d 796.

"Although an attorney in his argument to the jury may state the principles of law applicable to the action so far as it is necessary to enable him to discuss the evidence intelligently. . . ."

Makina v. Spokane, P. & S. Ry. Co., 155 Ore. 317, 63 Pac. 2d 1082, 1089.

"That counsel may in his argument, state what the law is and apply the law to the facts in the case is well established in California, provided of course, the statement of what he considers to be the law is correct."

People v. Dykes, 107 Cal. App. 107, 118;

De Armos v. Dickerman, 108 Cal. App. 2d 548, 239 Pac. 2d 65.

Counsel for plaintiff asked the trial Court if it would be permissible in argument to refer to the instructions that might be given by the Court in order to conform the facts to the law as the Court would instruct. The trial Court advised plaintiff's counsel that no such argument would be permitted.

"Mr. Brobst. There was one other point, and that is this: In argument sometimes I like to refer to the instructions that will be given, and ask the jury to listen for them, to bring out and emphasize a point.

The Court. I would not suggest taking any chance on doing that here.

Mr. Brobst. I don't want to get up and say—

The Court. Not only that, but I have a personal custom, which all judges do not follow, and that is that I do not permit you to argue the law or to say that I am going to give an instruction, because I think that gives undue emphasis to the particular point that is being brought out, and the other side can get up say that I am going to say just absolutely the contrary. I might give something in between. As a matter of fact, I usually don't know what I am going to say to a jury—

Mr. Brobst. I am confronted with that problem myself when I get up to argue sometimes. This other point: I may explain the Act to them, the way it operates, that he was not covered by State compensation, and that the only recovery is under this Act?

The Court. You will have to leave that to me.

Mr. Brobst. That is what I want to know. You are taking (86) all my argument away from me."

(P.T. page 114, page 115.)

As shown by the above discussion with the Court, counsel was precluded from arguing the law or referring to the instructions. In addition, the Court prevented any statement with reference to the Federal Employers' Liability Act and that that act provided the only means of recovery for railroad employees engaged in interstate commerce. The Court stated that counsel would have to rely upon the Court for an explanation of that act. However, the reference made by the Court to the Act in instructing the jury would do nothing but leave an impression that there was other compensation that the plaintiff would receive.

"Of course, likewise, I don't need to say that you are not to consider what might be given under State law or some other law of compensation under certain circumstances to these people, or anything of the sort. You are to determine this strictly upon the question of whether or not there is liability under the instructions I have given you and then turn to the question of damages,

and on the question of damages follow the rules that I have given you. Of course, that cuts out of your consideration any possibility of some other statute or some other jurisdiction or some other law under which compensation might be given to them. I don't want to bring your attention to what those might be. This is tried in a very narrow channel, and these instructions that I give you show you what the limits are and what you are governed by, first on the question of liability and then on the question of damages. (153.)"

(P.T. page 171.)

Many times in these actions, juries are under the impression that an action of this kind is solely for the purpose of acquiring additional compensation or to repay to some source what the widow has received which would be somewhat in the nature of a subrogation claim. The situation was not thoroughly explained and, in fact, the very impression that counsel sought to clarify by argument was emphasized in the instruction when the Court said:

"Of, course, likewise I don't need to say that you are not to consider what might be given under State law or some other law of compensation under certain circumstances to these people, or anything of the sort . . . Of course that cuts out of your consideration any possibility of some other statute or some other jurisdiction or some other law under which compensation might be given them. I don't want to bring your attention to what those might be."

(P.T. page 171, page 172.)

Certainly, the Court by stating that it did not "want to bring your attention to what those might be," referring to other statutes, other jurisdiction, and some other law, could not have done other than arouse the curiosity of the jury in line with what we have previously stated. Certainly, this was an inadequate, if not misleading explanation of the rights of the plaintiff under the Federal Employers' Liability Act which was the only means by which plaintiff in this action could recover compensation for the death of the deceased. It is submitted that this further limitation prevented counsel from presenting an adequate and logical explanation of the act and which prevented plaintiff from having a full and fair trial.

(c) DEFENDANT FAILED TO DISCLOSE AT THE PRE-TRIAL, THAT THE PICTURES OF THE FOOTBOARD INTENDED TO BE USED BY THE PLAINTIFF WERE NOT PICTURES OF THE FOOTBOARD INVOLVED IN THE ACCIDENT.

Plaintiff produced for the defendant for the pre-trial order the pictures that plaintiff had taken of the footboard upon which plaintiff was standing in front of the engine. Defendant had these pictures in its possession for a considerable time prior to the making of the pre-trial order. Defendant was well aware that the pictures had been taken some time after the accident.

(P.T. page 73.)

Yet, at no time until the end of the trial did defendant establish as a defense which was not mentioned

in the pre-trial that the footboard involved in the accident had been removed shortly after the accident.

(P.T. page 139.)

There was no report made on the daily locomotive inspection reports indicating there had been any change in the locomotive footboards.

(P.T. page 140.)

This is a situation similar to the facts in *Burton v. Weyerhaeuser Lumber Co.*, 1 Fed. 571, where the defendant withheld from the plaintiff the fact that the burns that the plaintiff in that action had received could not have come from the acid named in the complaint and demonstrated in Court by placing the acid named in the complaint on the hand of an employee of the defendant and leaving it for several minutes and then washing it off without having any burns. The Court there said:

> ". . . but it must be made clear that surprise, both as a weapon of attack and defense is not to be tolerated under the new Federal Procedure."

The failure to advise plaintiff of this defense misled the plaintiff into placing the picture in evidence creating a false issue. This false issue could do nothing but confuse the jury and perhaps, antagonize them, because they may have felt that the plaintiff was endeavoring to mislead them with misrepresentative pictures. More confusing was the fact that the footboard involved in the accident was replaced by an old one with a protruding bolt. (See Plaintiff's Exhibits A, B, C.) Had the plaintiff been aware of this defense

the case would have been tried purely on the failure to stop the train when Daulton disappeared, for the injury and death, as evidenced by Daulton's personal effects, did not occur until some thirty-seven car lengths after he disappeared from the view of the engineer. The accident could have been avoided had the engineer stopped as he should have done in conformity with the custom and practice. This surprise and resulting confusion of pictures could not help but be prejudicial to plaintiff.

(d) PREJUDICIAL COMMENT OF TRIAL JUDGE WITH REFERENCE TO THE TESTIMONY OF EXPERT WITNESS CALLED BY PLAINTIFF.

The witness, Zimmerman, was called by the plaintiff to testify to the stopping distance of a train composed of the same type of cars as the train involved in the accident. He was a switchman employed by the defendant and had been so employed for eighteen years.

> "Q. Mr. Zimmerman, what is your business or occupation, please?
>
> A. I am a switchman for the Southern Pacific Company.
>
> Q. How long have you been employed by the Southern Pacific Company?
>
> A. 18 years."
>
> (P.T. page 75.)

He had been a helper on switch crews and he had been an engine foreman and had worked two months as a brakeman.

"Q. What types of work have you done generally?

A. Helper on switch crews and engine foreman, and two months as brakeman."

(P.T. page 77.)

After this qualification he was asked in what distance the movement of an engine, two K and J cars, a ditcher, and a caboose traveling at two to four miles an hour could have stopped.

(P.T. page 77.)

The Court sustained an objection and stated:

"I think that is correct. I don't think he has had any experience to qualify him to answer."

(P.T. 78.)

The same general question was again asked (P.T. page 78) and over objection the Court permitted him to answer but, in so doing, completely discredited his answer by the following statement:

"He has worked around trains. It is a question for the jury. Ladies and Gentlemen of the jury, I think that this witness has shown no particular qualifications, anymore than you or I would have about this, but he has seen trains in operation, perhaps. . . ."

(P.T. page 78.)

Certainly, this trainman who had worked for the defendant for eighteen years as a switchman and engine foreman was qualified to testify as to the stopping distance of a train such as was involved here.

There was no question but what he was far better qualified than the jurors who were ordinary laymen. The Courts have so held.

See:

Peters v. Southern Pacific Co., 160 Cal. 48, 116 Pac. 400;

Newkirk v. Los Angeles, 21 Cal. 2d 308, 131 Pac. 2d 535.

In the above cases the Court clearly states that the management and operation of trains is a matter outside the experience and knowledge of ordinary jurors, This comment by the Court certainly reduced the effectiveness of other testimony given by this witness to the prejudice of the plaintiff. This witness was amply qualified as an expert.

Weinsatts, Adm. v. L. & N., 31 S.W. 2d 734;

Chicago Great Western v. Beecher, 150 Fed. 2d 394;

Byrd v. Va. Railroad, 13 S.E. 2d 273.

It has been held prejudicial error for the Court to distort and discredit the testimony of a witness as the Court did here.

"As we stated in *Quercia v. United States,* 289 U.S. 466, 469, 53 Supreme Court 698, 699, 77 L. Ed. 1321:

'This privilege of the judge to comment on the facts has its inherent limitations. His discretion is not arbitrary and uncontrolled, but judicial, to be exercised in conformity with the standards governing the judicial office. In commenting upon testimony he may not assume the role of a wit-

ness. He may analyze and dissect the evidence, but he may not either distort it or add to it.' "

Cal-Bay Corp. v. United States, 169 Fed. 2d 15, 21.

It is submitted that this comment by the Court completely destroyed the testimony of this witness to the prejudice of the plaintiff.

SUMMATION OF ARGUMENT.

The evidence is sufficient to establish that the employees of the Southern Pacific Railroad Company other than the deceased were negligence in failing to stop the movement of the train involved in the accident when the deceased disappeared from the view of the engineer of the train. From this evidence, the jury could have found that a proximate cause of the death of deceased was the failure of other members of the train crew to follow the custom and practice and stop the train when deceased disappeared from their view. Had a judgment been rendered in favor of the plaintiff, the evidence would have been sufficient to sustain that verdict. However, there was a conflict in the evidence and because of the erroneous instructions given by the Trial Court with reference to the contributory negligence and negligence of the deceased when the law presumes that deceased was in the exercise of ordinary care and when there was no issue of contributory negligence framed by the pre-trial order, certainly such instructions were highly prejudicial to plaintiff. In addition, the Trial Court by depriving counsel for

appellant of the right to argue the case in conformity with recognized rules prevented plaintiff from having her action fairly presented to the jury. Counsel for appellant was prevented from arguing the facts with reference to the law and also was prevented from stating the full import of the Federal Employers' Liability Act. This left nothing substantial to be argued to the jury, which was certainly prejudicial to the interests of the plaintiff, for plaintiff having the burden of proof, was stopped from presenting to the jury the law that supported her contentions for a recovery. Further, the Trial Court by an unwarranted comment upon the testimony of one of plaintiff's expert witnesses tended to cast discredit upon the case of the plaintiff. The same situation was presented when defendant without having disclosed at the pre-trial hearing or by the pre-trial order established an as affirmative defense that the pictures introduced in evidence by the plaintiff were not pictures of the engine footboard involved in the accident. This was surprise which the pre-trial is supposed to eliminate, and which is not to be tolerated. This accumulative series of errors under the conflict of the testimony certainly and clearly prevented plaintiff from having a fair trial and the judgment herein should be reversed.

CONCLUSION.

It is respectfully submitted that the trial Court, by instructing the jury with reference to an issue not contained in the pre-trial order and in further con-

veying to the jury by way of erroneous instructions that the deceased was negligent inferentially cast the burden on the plaintiff to establish that the deceased was without fault. This was prejudicial error requiring a reversal of the judgment herein. In addition, the presentation of evidence by defendant which was not disclosed by the pre-trial order which allowed plaintiff to be forced into a position of having to admit that certain evidence, the pictures, was not correct, was prejudicial to plaintiff. And, then the comment of the Court with reference to one of plaintiff's witnesses could do nothing except cast doubt upon the evidence and veracity of plaintiff's witness. Finally, the Court by erroneously limiting counsel's argument, deprived plaintiff of an opportunity to have her case intelligently argued on the facts and law.

It is submitted that the judgment, because of the errors pointed out, should be reversed.

Dated, Oakland, California,
April 2, 1956.

Respectfully submitted,
HILDEBRAND, BILLS & MCLEOD,
D. W. BROBST,
Attorneys for Appellant.

No. 14924

In the United States Court of Appeals For the Ninth Circuit

MARY EDITH DAULTON, Administratrix of the Estate of DONALD LEROY DAULTON, Deceased, *Appellant,*

vs.

SOUTHERN PACIFIC COMPANY, a corporation, *Appellee.*

APPELLEE'S BRIEF

Appeal from the United States District Court
for the District of Oregon

HONORABLE JAMES ALGER FEE, Circuit Judge

KOERNER, YOUNG, McCOLLOCH & DEZENDORF,
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SOUTHERN PACIFIC COMPANY, a corporation, *Appellee.*

APPELLEE'S BRIEF

Appeal from the United States District Court
for the District of Oregon

HONORABLE JAMES ALGER FEE, Circuit Judge

JURISDICTION

This is an action under the Federal Employers' Liability and Boiler Inspection Acts (45 U.S.C.A. § 51 et seq. and § 23 et seq.). The District Court had jurisdiction under 45 U.S.C.A. § 56.

This court has jurisdiction of this appeal under 28 U.S.C.A. § 1291.

ANSWER TO APPELLANT'S "SUMMARY STATEMENT OF EVIDENCE AND PLAINTIFF'S THEORY FOR A RECOVERY"

Appellant has set out at pages four to six of her brief a statement of facts and concludes:

> "* * * *the jury could have found the defendant railroad liable*"

and

> "* * * *or the jury could have found that a proximate cause of deceased's death was the negligence of the defendant*"

To appellant's statement of facts, we wish to add that there was substantial evidence that the right front footboard of the engine was in no way defective (Tr. 125-126; 133-136; 138-140; 143-144; Exhs. 2 I through 2 N, inclusive), and that there was no custom or practice as to stopping a train when a brakeman disappears from the view of the engineman (Tr. 121, 123).

Appellee does not feel that there was substantial evidence of negligence on its part and appellee duly moved for a directed verdict on this ground (Tr. 146-147).

However, since the jury found for appellee (Tr. 21) it *did find* that there was no defect in the footboard

and *did find* there was no custom or practice of stopping a train when a brakeman disappears from view.

We believe that appellant had a fair trial on these disputed issues and that the lower court committed no error in the trial of this case.

QUESTIONS PRESENTED

1. Did the court err in instructing the jury that contributory negligence should be considered by it in assessing damages?

2. Did the court err in limiting argument of appellant's counsel to the facts and refusing to allow appellant's counsel to instruct the jury as to the law?

3. May appellant claim error because appellee proved on trial that the footboard involved in the accident was taken off the engine the day following and stored until the time of trial, when:

(1) Appellant made no objection on this ground until her motion for a new trial and

(2) Appellee's counsel advised appellant's counsel of the true facts the day before the trial and again in his opening statement to the jury?

4. Did the trial judge prejudice appellant's case by advising the jury that he did not feel that a proffered

expert witness of appellant possessed particular qualifications to express an opinion on the stopping distance of appellee's train when that matter was not a disputed issue in the case and was established by other witnesses?

SUMMARY OF ARGUMENT

I.

The court did not err in instructing the jury that contributory negligence of appellant's decedent would diminish the damages of appellant. There was substantial evidence of contributory negligence on the part of the decedent.

II.

The court did not err in refusing to allow appellant's counsel to instruct the jury as to the law.

It is the province of the court, not counsel, to instruct the jury on the law.

III.

Appellant was not misled or prejudiced by appellee's proof that appellant's pictures did not accurately represent the engine footboard at the time of the accident.

Appellee's counsel advised appellant's counsel of this fact at least the day before the trial and discussed the matter in his opening statement.

Appellant did not ask for a continuance or object on this ground until her motion for a new trial.

IV.

The trial court did not prejudice appellant's case by commenting on the qualifications of Mr. Zimmerman to testify as to the stopping distance of the train.

There was other competent evidence of the stopping distance and no dispute on that question between the parties.

ARGUMENT

I.

The court did not err in instructing the jury that contributory negligence of appellant's decedent would diminish the damages of appellant. There was substantial evidence of contributory negligence on the part of the decedent.

In appellant's brief on this point (Appellant's Br. 10-16) appellant contends that the court erred in instructing the jury on the subject of contributory negligence and asserts four separate grounds as follows:

(1) That the deceased was conclusively presumed to be using due care;

(2) That contributory negligence was outside the issues of the pretrial order;

(3) That the court failed to instruct that appellee had the duty of proving contributory negligence by a preponderance of the evidence; and

(4) That the court "told the jury that the deceased did not use ordinary care" (Appellants' Br. 13).

Only one of the above grounds is properly before this court, that is, No. (1), appellant's assertion that the deceased was conclusively presumed to be using due care.

Rule 51 of the Federal Rules of Civil Procedure provides:

> "* * * No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, *stating distinctly the matter to which he objects and the grounds of his objection.*" (Emphasis supplied.)

Appellant's objection to the court's instructions is as follows:

> "THE COURT: Any exceptions, gentlemen?
>
> "MR. BROBST: There is only one, your Honor. That was the question of the instruction on contributory negligence. I believe under the circum-

> stances, where the law conclusively presumes that the plaintiff was in the exercise of ordinary care, there being no evidence in the record to the contrary or that he did any act that could be construed as an act of contributory negligence, the instruction should not have been given." (Tr. 175)

This court has held that only the grounds of objection stated by counsel at the time of trial will be considered on appeal under Rule 51.

In *Woodworkers Tool Works vs. Byrne*, 191 F. 2d 667 (9 Cir., 1951), this court held (p. 676):

> "We are of the opinion that Woodworkers Tool Works may not take advantage of any error in the charge as to *res ipsa loquitur* to procure a reversal because it made no appropriate objection as required by Rule 51, F.R.C.P., 28 U.S.C.A. The appellant failed to state *distinctly* to the court below the matter in the charge to which it objected and the ground of its objection."

See, also Barron and Holtzoff, Federal Practice and Procedure, Volumn II, page 799, § 1104.

There was substantial evidence of contributory negligence in this case.

It is undisputed that the deceased was riding the right front footboard of the engine of a slow moving

freight train and that somehow he fell off the engine and met his death under the front trucks.

On these facts, if there was a jury question of negligence on the part of appellee, there was certainly a like jury question of contributory negligence on the part of appellant's decedent. There was evidence that appellant's decedent was not required to ride the front of the engine and the jury could have found that his presence there constituted contributory negligence or that somehow through decedent's own fault and through no fault of appellee he fell off the engine.

Appellant's witness Biwer testified that there was no necessity for appellant's decedent to be on the front footboard since the engineer had a block signal to indicate where to stop and the welders working on the track were 75 car lengths past the scene of the accident so that the presence of decedent on the front of the engine was unnecessary to warn the welders (Tr. 53).

Appellant's witness Williams testified that there was no need for appellant's decedent to ride the front footboard (Tr. 85-86).

Appellant's witness Warmack testified that sometimes brakemen do ride the front steps of an engine without any necessity therefor (Tr. 100).

It is undisputed that appellant's decedent was not directing the movement of the train (Engineer Shively, Tr. 124).

From the above evidence, it is clear that the jury could have found that appellant's decedent was riding on the front of the engine through his own choice and that he met his death through an accident for which he himself was wholly responsible.

It has been held in a case such as this that the only inference possible would be that of contributory negligence.

In the case of *Kansas City Southern Ry. Co. vs. Jones*, 276 U.S. 303, 72 L. Ed. 583, it appeared that a car inspector was found dead near the railroad tracks and there was no evidence as to how he met his death. Justice Holmes, speaking for the Supreme Court, reversed a plaintiff's verdict, saying:

> "Nothing except imagination and sympathy warranted a finding that the death was due to the negligence of the petitioner rather than to that of the man himself."

See, also, the recent case of *Schultz vs. Pennsylvania Railroad Co.*, ... U.S. ..... (1956), 100 L. Ed. (Advance, p. 430), where it appeared that plaintiff's decedent was

working on some icy tugboats at night with insufficient lighting provided by the defendant, who was his employer. The decedent fell off a tugboat and drowned and there was no evidence as to how the accident happened. The district court directed a verdict for the defendant and the Court of Appeals for the Second Circuit affirmed (222 F. 2d 540). The Supreme Court reversed, saying that the question of negligence of the defendant would be for the jury but the court stated contributory negligence would also be for the jury saying (p. 432 of 100 L. Ed. Advance):

> "And reasonable men could also find from the discovery of Schultz's half-robed body with a flashlight gripped in his hand that he slipped from an unlighted tug as he groped about in the darkness attempting to perform his duties. But the courts below took this case from the jury because of a possibility that Schultz might have fallen on a particular spot where there happened to be no ice, or that he might have fallen from the one boat that was partially illuminated by shore lights. *Doubtless the jury could have so found (had the court allowed it to perform its function) but it would not have been compelled to draw such inferences.*"

Based upon the above authorities and the evidence in this case, it is clear that there was evidence from which the jury could have found contributory negligence and the lower court was not in error in instructing the jury on that subject.

As we pointed out above, appellant's reason stated to the trial court for objecting to the instructions on contributory negligence is the only one before this court although appellant's brief argues several other grounds. The other grounds asserted by appellant are also without merit.

As to appellant's assertion that contributory negligence was not made an issue in the pretrial order, the law is clear that in a case under the Federal Employers Liability Act contributory negligence is not a defense and need not be pleaded.

In the case of *Kansas City Southern Ry. Co. vs. Jones*, 241 U.S. 181, 60 L. Ed. 943, it appeared that the state courts of Louisiana had excluded evidence of contributory negligence in a Federal Employers Liability Act case for the reason that it was not pleaded as a defense in the defendant railroad's answer. The Supreme Court discussed Section 3 of the Act, providing that contributory negligence is no defense but may merely be used to diminish damages, and stated:

> "Manifestly, under this provision, a defendant carrier has the Federal right to a fair opportunity to show in diminution of damages any negligence attributable to the employee.
>
> "The state supreme court upheld the railway company's claim of right to show contributory negligence under its general denial; but the trial court emphatically denied this and positively excluded all

evidence to that end. As, under the Federal statute, contributory negligence is no bar to recovery, the plain purpose in offering the excluded evidence was to mitigate damages."

In *Gray vs. Pennsylvania R. Co.*, 71 F. Supp. 683 (S.D., N.Y., 1946) the court struck from a pleading the defense of contributory negligence in a Federal Employers Liability Act case, saying:

> "In its answer defendant specifically denies all the allegations of the complaint that plaintiff's injuries were caused solely by the negligence of defendant or its employees, etc. The allegations in these defenses that he was injured solely by reason of his own negligence and without any fault or negligence on the part of defendant or its employees are superfluous. *These facts can all be proved under the general denial, which puts in issue not only the question of defendant's negligence but also the question of plaintiff's contributory negligence.* * * *
>
> "Therefore, the second and third defenses are both superfluous and unnecessary, as well as insufficient in law, and must be stricken."

The above authorities clearly demonstrate that since contributory negligence is no defense in a Federal Employers Liability Act case, it need not be pleaded and is an issue under a general denial of negligence.

It further appears that since the court instructed the jury that contributory negligence is not a defense

but could only be used to reduce damages and since the jury found for appellee, the instructions on contributory negligence could not have prejudiced appellant's case. The court instructed the jury:

> "* * * Contributory negligence is not a defense in this case at all." (Tr. 172)

In the case of *Dow vs. United States Steel Corp.* 195 F. 2d 478 (3 Cir., 1952), which was a Jones act case, the court said:

> "In addition, it should be said, as defendant points out, that since the jury returned a verdict for the defendant, it necessarily did not get to the question of contributory negligence on the part of the plaintiff. The error, if one had existed, was harmless."

See also the case of *Tracy vs. Terminal R. Ass'n. of St. Louis*, 170 F. 2d 635 (8 Cir., 1948) where the court said (p. 640):

> "The jury having determined this issue in favor of defendant, then clearly the question of decedent's contributory negligence became immaterial, as did also any testimony going to the extent of decedent's injuries or the amount of damages recoverable."

It therefore appears that since the court instructed the jury that contributory negligence was not a defense

and since the jury found for appellee, it found that appellee was not negligent at all, and any error on the subject of contributory negligence could not have prejudiced appellant.

II.

The trial court did not err in refusing to allow appellant's counsel to instruct the jury as to the law.

> "It is the function and duty of a trial court, when called upon by either of the parties, to instruct the jury as to the principles of law applicable to the case on trial, and it is the duty of the jury to observe and conform to such instruction. Counsel cannot be permitted, therefore, to argue to the jury against the court's instructions, nor to indulge in any line or argument or comment which would tend to induce them to disregard the instruction given for their guidance." 53 Am. Jur. 397, Trial § 492.

In the Oregon case of *Mason vs. Allen et al*, 183 Ore. 638, 195 P. 2d 717, the court said (pg. 644):

> "The practice of reading law to the jury by counsel—either from a book or a manuscript—is not one to be encouraged. *Lang vs. Camden Iron Works*, 77 Or. 137, 148, 146 P. 964. It must be conceded, however, that the law is the major premise of every jury argument and it is not always possible to keep the premise inarticulate. It is difficult to see how a lawyer could argue a criminal case to a jury without referring to the rules of pre-

sumption of innocence and reasonable doubt, or how, in arguing a negligence case such as this, a lawyer could refrain from mentioning the conduct of a reasonably prudent person. *But, aside from references to such elementary rules, about which there can be no difference of opinion, statements by counsel of their views of the law and predictions as to instructions that will be given by the court — save where the court has previously advised counsel on the subject—have no place in the argument. The trial judge has ample power to control the argument in this regard and should exercise it, for the jury, while exclusive judges of the facts, must look to the court, not to counsel, for guidance as to the law of the case,*" (Emphasis supplied.)

In the case of *Glendenning Motorways, Inc. vs. Anderson et al*, 213 F. 2d 432 (8 Cir. 1954) the court said:

"Counsel for plaintiff in the course of his closing argument read to the jury what were stated by him to be applicable statutes of the State of Wisconsin and he commented thereon giving his views as to their construction and meaning. *The practice, we think, is reprehensible and should not be tolerated. It is the function and duty of the trial court to instruct the jury as to the law and it is the duty of the jury to accept as the applicable law that given by the court and no other.* It is the duty and province of the jury to find and determine the facts, not the law. (Citing cases)" (Emphasis supplied.)

If appellant wished the jury to be given certain instructions, she had the privilege of requesting them pursuant to Rule 51 of the Federal Rules of Civil Procedure. *Appellant requested no instructions* and therefore cannot complain now that the court erred in refusing to allow her counsel to instruct the jury.

It is clear from the above authorities that the trial court committed no error in refusing to allow appellant's counsel to argue the law to the jury.

If counsel were permitted to predict instructions and state the law, it could only confuse the jury and unduly emphasize the points discussed. As Judge Fee said: (Tr. 114)

> "* * * I do not permit you to argue the law or to say that I am going to give an instruction, because I think that gives undue emphasis to the particular point that is being brought out, and the other side can get up and say that I am going to say just absolutely the contrary."

The trial court committed no error in this regard.

III.

Appellant was not misled or prejudiced by appellee's proof that appellant's pictures did not accurately represent the engine footboard at the time of the accident.

Appellee's counsel in his opening statement advised the jury that the proof would show that the footboard involved in the accident had been removed the next day and stored until the time of trial.

> "* * * And because something happened, or something may have happened to the footboard—it may have been bumped or something like that—the board was removed the morning after the accident. It has been put aside in the storeroom until yesterday, when it was replaced on the locomotive." (Tr. 37)

The original pretrial order discloses that appellee did not waive identification of appellant's photographs (see original pretrial order, p. 4—notes at the side of appellant's exhibits A, B and C). Appellant waived identification of appellee's photographs which were exhibited to appellant's counsel *before trial.* No objection was made by appellant before or during the trial. Appellant was content to sit by and gamble on the outcome and should not now be allowed to complain because the gamble was lost, and this is especially true where *appellant made no objection during trial and*

the trial judge made no ruling during the trial on this point.

IV.

The trial court did not prejudice appellant's case by commenting on the qualifications of Mr. Zimmerman to testify as to the stopping distance of the train.

The trial court's comments concerning the qualifications of proferred expert witness Zimmerman could not possibly have prejudiced appellant's case. The trial court did not comment on any disputed question but merely told the jury that he did not believe that Mr. Zimmerman had sufficient qualifications to give an opinion as to the stopping distance of trains and that the jury should take into consideration Mr. Zimmerman's experience in weighing his testimony (Tr. 78).

The entire record discloses that there was no dispute between the parties as to the distance within which the train could be stopped and that appellee did not make an issue of that question.

When it appeared that the stopping distance of the train would be relevant to the other issues, the trial court asked counsel to stipulate and agree as to how many feet a train like the one involved in the accident could be stopped (Tr. 43). Thereafter, appellant's wit-

ness, Biwer, testified without objection from appellee that the train could be stopped, "Oh, within 10 to 15 feet" (Tr. 51). The disputed witness, Zimmerman, testified "within a few feet, or almost immediately" and this answer was allowed to stand (Tr. 78). Witness Williams testified over objection "in between four to six feet" (Tr. 83) and witness Warmack testified without objection "six to eight feet" (Tr. 97).

Appellee produced no evidence to contradict these witnesses.

Any comment the trial court made as to one of the witnesses testifying on this limited and undisputed point could not have possibly prejudiced the appellant's case.

CONCLUSION

It is respectfully submitted that the trial court did not err in instructing the jury on contributory negligence since there was substantial evidence thereof and contributory negligence was an issue in the case. Further, if the trial court did err on this subject, since the jury was told that contributory negligence was not a defense but would merely diminish damages, the defense verdict of the jury conclusively discloses a finding of no negligence on the part of appellee so that contributory negligence was not considered.

The court properly refused to permit appellant's counsel to instruct the jury as to the law since that is the function of the court.

Appellant was advised before the trial and in appellee's opening statement that the footboard was changed immediately after the accident and that her pictures did not disclose the true condition. Appellant made no point of this matter until after the adverse verdict and then for the first time raised the point in her motion for a new trial. Appellant was not prejudiced thereby.

The court's comment on the qualifications of a witness who testified cumulatively to an undisputed fact in the case could not under any circumstances have prejudiced appellee.

The trial court committed no error and must be affirmed.

Respectfully submitted,

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Attorneys for Appellee.

No. 14,924

United States Court of Appeals

For the Ninth Circuit

MARY EDITH DAULTON, Administratrix of the Estate of Donald LeRoy Daulton, deceased,

Appellant,

vs.

SOUTHERN PACIFIC COMPANY, a corporation,

Appellee.

APPELLANT'S REPLY BRIEF.

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No. 14,924

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vs.

SOUTHERN PACIFIC COMPANY, a corporation,

Appellee.

APPELLANT'S REPLY BRIEF.

ARGUMENT.

We first would like to clarify the following statement appearing at page 16 of Appellee's Reply Brief.

> "If appellant wished the jury to be given certain instructions she had the privilege of requesting them pursuant to Rule 51 of the Federal Rules of Civil Procedure. *Appellant requested no instructions* * * *."

Both Appellant and Appellee requested a full set of instructions and all were rejected by the Trial Court.

> "According to the Civil Rules I am supposed to give you an idea as to what I will do with the requested instructions. I hereby reject them all."
>
> (P.T. page 148)

The exceptions taken to the instructions on contributory negligence, were directed to the point that, such instructions as given by the Court, permitted the jury to find that a want of due care upon the part of deceased would defeat a recovery by the plaintiff. If it was addressed only to the question of damages, although erroneous, the probability would be that they would not constitute reversible error. But, where, as here, they would prevent a recovery such erroneous instructions were highly prejudicial.

The Court instructed:

> "But you must remember that if Daulton was solely at fault, and no negligence on the part of the railroad contributed to his death, then you would not permit any recovery at all and you would not arrive at any consideration of damages."
>
> (P.T. page 174)

Plaintiff's exception was clearly directed at this specific point.

> "The Court. Any exceptions, Gentlemen?
>
> Mr. Brobst. There is only one, your Honor. That was the question of the instruction on contributory negligence. I believe under the circumstances, where the law conclusively presumes that the plaintiff was in the exercise of ordinary care, there being no evidence in the record to the contrary or that he did any act that could be construed as an act of contributory negligence, the instruction should not have been given.
>
> The Court. I don't know what the jury is going to find about that. If I went into the question of negligence on either side and had not

gone into that, I would think I was not following the rule that is laid down for me. I think (157) that applies to contributory negligence just as much as it does to negligence. The Supreme Court, as I understand it, has said these are jury questions, and I am going to submit both of them.

Mr. Brobst. I just read one case the other day where that instruction was given, and the Court said it should not have been given because there was no actual eye-witness to the accident, and in view of those facts it was conclusively presumed that he was in the exercise of ordinary care.

The Court. I think it is conclusively presumed, also, that the employes of the railroad are in the exercise of ordinary care. I won't give it, anyhow. I think these are jury questions; and if you are going to submit one side, you have to submit the other."

It was apparent from the statement of the Court that there would be no change in the instructions. The whole argument of counsel was to the effect that the deceased could not be charged with negligence in the absence of witnesses to his conduct. There was no act shown in the evidence that was done or committed by the deceased that could possibly charge him with a want of care.

He did not have a choice of a place to ride. The engineer, as well as the conductor who was in charge of the train, stationed the crew members.

"Q. (Mr. Biwer, train conductor) Who has charge of the train in a movement of that kind?

A. The conductor jointly with the engineer.

Q. What would be the purpose of Mr. Daulton being out on the front footboard of that engine?

A. Well, piloting by the welders that was working there in case they didn't have their equipment off the track, and also to let him into the siding."

(P.T. pages 51 and 52)

"Q. (Mr. Rutledge) Who stations the men, tells them where to be on the train as the movement is being made?

A. The conductor."

(P.T. page 59)

"Q. (Mr. Zimmerman) Who has control of the position of the men on a train when a move of that kind is being made?

A. Well, the engineer would have up on the head end."

(P.T. page 79)

"(Thomas C. Warmack)

Q. What would be the reason for a brakeman to be out on the front footboard of the engine?

A. Well, I wouldn't know of any under that circumstance.

Q. Where does he ride if he has no duty to perform, the head brakeman?

A. In the engine.

Q. Who is the one that is to tell him where to ride?

A. Usually the one which is closest to him, which is the engineer, notwithstanding the fact that the conductor has the authority to place his men any place he so desires.

Q. But the usual thing is whoever is closest to him normally does it; is that right?

A. If he is assigned to the head end, then ordinarily he abides by the engineer's instructions while around the engine." (67)

(P.T. page 98)

This testimony is all that is in the record on the subject, and it definitely establishes that the placing of the crew members was controlled by the conductor or engineer, and here the conductor testified that the deceased was on the footboard, "piloting by the welders that was working there in case they didn't have their equipment off the track, and also to let him in the siding".

Under the evidence there was no fact or testimony that could sustain a finding of negligence upon the part of the deceased. Yet, under the instructions as given and excepted to and in face of the presumption that deceased was in the exercise of ordinary care, the jury may have erroneously found that the accident was the result of deceased's negligence or fault. The jury should have been told as plaintiff urged that there could be no fault found upon the part of the deceased, and that it was error to instruct that the contributory negligence or fault of deceased would defeat a recovery.

The question is not whether there was no fault upon the part of the defendant, but whether the Court erroneously advised the jury that they could find negligence upon the part of the deceased that would prevent a recovery contrary to the presumption of due care. That was the exception urged against the errror made by the Court in so instructing.

CASES RELIED UPON BY APPELLEE.

The cases relied upon by the appellee are not in point here.

In *Kansas City Southern Ry. Co. v. Jones,* 276 U.S. 303, 72 L.Ed. 583, there was no evidence of negligence upon the part of the defendant, and no evidence that deceased was where he should have been or that he was performing his duties. Here, there is evidence that deceased was piloting the train past welders, and that he was placed on the front of the locomotive either by the conductor or engineer, and there was evidence of negligence upon the part of the defendant for failure to stop when the deceased went out of view of the engineer.

Kansas City Southern Ry. Co. v. Jones, 241 U.S. 181, 66 L.Ed. 943, held simply that under general pleading defendant could show contributory negligence. There was no pretrial order, as here, where the issues are framed for the very purpose of eliminating such questions. If the question only went to diminution of damages that would be one thing, but here the erroneous instructions permitted the jury to find negligence upon the part of deceased to defeat a recovery. Under such instructions, the negligence of the deceased was made a defense, to be made an issue and to be established affirmatively by a preponderance of evidence.

The same criticism applies to the case of *Gray v. Pennsylvania R. Co.,* 71 F. Supp. 683 (S.D. N.Y. 1946). There was no pretrial order to frame the issues. This case was purely a question of pleading and did not involve a fact situation where the plain-

tiff was entitled to a presumption that the deceased exercised due care, and then an instruction being given that permitted the jury to find a want of due care to defeat a recovery.

Again, in *Dow v. United States Steel Corp.,* 195 F. 2d 478 (3 Cir. 1952), the instruction only went to the question of reduction of damages and was not prejudicial. Here, the instruction went to the heart of the case, the right to recover. This same distinction applies to *Tracy v. Terminal R. Ass'n of St. Louis,* 170 Fed. 2d 635 (8 Cir. 1948).

RESTRICTION OF ARGUMENT.

Appellee does not reach the point urged by appellant. There was no suggestion upon the part of counsel that any law was to be read to the jury, and there was no intent upon the part of counsel to do so. The only point was that in arguing the case for plaintiff, counsel desired to correlate the facts with the law, so that a logical presentation could be made to the jury. The law as pointed out in appellant's opening brief sanctions and approves such procedure.

This was denied, and the Court was informed that argument upon the part of the appellant had been taken away by the Court.

> "The Court. You will have to leave that to me.
> Mr. Brobst. That is what I want to know. You are taking all my argument away from me."
> (P.T. pages 114 and 115)

Certainly, as pointed out in the opening brief of appellant the right to apply the facts to the applicable

law in argument is not disputable. The Court under Section 51 of the Federal Rules of Civil Procedure should have advised counsel as to the nature of the instruction so an intelligent argument could have been made. There is no question but what reading of statutes or misstating the law would be improper. But if such attempt was made it could have been stopped at the time, but to deny counsel the right to present the facts in the light of the law was certainly prejudicial.

COMMENTS OF TRIAL COURT.

Although the testimony that was commented upon by the Trial Court may have been cumulative, it nevertheless cast a shadow upon the case of the plaintiff and her witnesses. The jury may have felt that other witnesses who had the same experience were subject to the same criticism. The effect of other portions of his testimony not cumulative may have been affected. The error of the Trial Court in this connection is apparently admitted, but is sought to be explained away upon the theory that the testimony of the witness was cumulative. However, how much of his other testimony was destroyed by the comment is a matter of conjecture.

CONCLUSION.

There was ample evidence in the record to sustain a judgment for plaintiff had the jury returned a verdict in her favor. The questions of fact were close; and the Trial Court erroneously instructing on an

issue not presented by the pretrial order, and opposed to a legal presumption and the facts, certainly was prejudicially erroneous. This error was sufficient for a reversal, also the limiting of argument, and comment of the Trial Court as to the testimony of one of plaintiff's witnesses, was highly prejudicial warranting a reversal. Under such circumstances justice requires a reversal.

> "An error in instructing a jury may be raised by an appellate court, when justice seems to require even though it cannot be raised by the appellant."
>
> *Harlem Taxicab Assoc. v. Neuresh,* 191 Fed. 2d 459.

> "But where it is apparent to the appellate court on the face of the record that a miscarriage of justice may occur because counsel has not properly protected his client by timely objection, error which has been waived below may be considered on appeal * * *."
>
> *Montgomery v. Virginia Stage Lines,* 191 Fed. 2d 770;
>
> *Dowell v. Jowers,* 166 Fed. 2d 214;
>
> *Shokuwan Shimabukuro v. Higeyoshi Nagayama,* 140 Fed. 2d 13.

Dated, Oakland, California,
May 25, 1956.

Respectfully submitted,
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No. 14926

United States
Court of Appeals
for the Ninth Circuit

PACIFIC FREIGHT LINES and SIDNEY S. RUSSELL, Appellants,

vs.

UNITED STATES OF AMERICA, Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern District of California, Central Division

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif. —4-2-56

No. 14926

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PACIFIC FREIGHT LINES and SIDNEY S. RUSSELL, Appellants,

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In the District Court of the United States, Southern District of California, Central Division

Civil Action No. 17356-Y.

PACIFIC FREIGHT LINES and SIDNEY S. RUSSELL, Plaintiffs,

vs.

EUGENE A. PHELPS, UNITED STATES OF AMERICA, Defendants.

COMPLAINT FOR PROPERTY DAMAGE AND FOR PERSONAL INJURIES

Comes Now the plaintiff Pacific Freight Lines and complains of the defendants and alleges:

I.

This action is pursuant to authority of Section 1346(b), Title 28, U. S. Code, commonly known as the Federal Tort Claims Act.

II.

That at all times herein mentioned, the plaintiff Pacific Freight Lines was and still is a corporation duly authorized to do and doing business in the State of California.

III.

That at all times material herein, the plaintiff Pacific Freight Lines was the owner of a certain Sterling tank truck.

IV.

That the collision hereinafter referred to, oc-

curred on U. S. Highway 66, at a point approximately 10 miles west of the City of Barstow, County of San Bernardino, State of California, and that said collision occurred within the judicial district and division of this Honorable Court.

V.

That at all times herein material, the defendant Eugene A. Phelps was a member of the United States Air Force, and at all times herein mentioned, defendant Eugene A. Phelps was acting in the course and scope of his office as a member of the United States Air Force.

VI.

That at all times material herein, the United States Air Force was the owner of a certain 1951 Chevrolet automobile, which at all times herein mentioned was being operated by the defendant Eugene A. Phelps with the permission and consent of said owner.

VII.

That on or about the 5th day of February, 1954, on United States Highway 66, at a point approximately 10 miles west of the City of Barstow, County of San Bernardino, State of California, the defendant Eugene A. Phelps so negligently and carelessly maintained, operated, drove and controlled said 1951 Chevrolet automobile as to directly and proximately cause the same to run into and collide with said Sterling tank truck.

VIII.

That as a direct and proximate result of the negligence and carelessness of the defendants as aforesaid, the Sterling tank truck of the plaintiff was wrecked, damaged and depreciated so that the reasonable and necessary cost of towing and repairing the same was the sum of $2,433.51, all to the damage of said plaintiff in a like amount.

IX.

That as a further direct and proximate result of the aforesaid carelessness, recklessness and negligence of the defendants and each of them and of said collision as aforesaid, plaintiff was deprived of the use of said Sterling tank truck for a period of twenty-seven (27) days, which is and was a reasonable period required to effect the necessary repairs to said Sterling tank truck; that by reason of the deprivation of the use of said Sterling tank truck as aforesaid, the plaintiff lost certain profits which thereby might have accrued to plaintiff; that the reasonable value of the use of said Sterling tank truck was and is the sum of $57.60 per day; that the loss of profits accruing to plaintiff as aforesaid was and is the sum of $57.60 per day; that by reason of the deprivation of the use of said Sterling tank truck as aforesaid and the loss of profits which thereby might have accrued to plaintiff, plaintiff has been further damaged in the sum of $1,555.20.

Plaintiff Sidney S. Russell complains of the defendants and for cause of action alleges:

I.

Plaintiff repeats, repleads and realleges each and every allegation contained in Paragraphs I, IV, V, VI and VII of the foregoing cause of action and by reference thereto incorporates the same herein as though fully set forth anew.

II.

That at all times herein material, the plaintiff was driving a certain Sterling tank truck.

III.

That as a direct and proximate result of the carelessness and negligence of the defendants as aforesaid, the plaintiff has suffered and will in the future continue to suffer painful and severe injuries and was made sick, sore and lame and was injured in and about the head and face; as a further direct and proximate result of said negligence and carelessness, said plaintiff was caused to suffer and did suffer and will continue to suffer great mental, physical pain and anguish and by reason thereof plaintiff has been damaged in the sum of $15,000.00.

IV.

That as a further direct and proximate result of the negligence and carelessness of the defendants as aforesaid, said plaintiff has incurred obligations in the sum of $168.66, for the care, cure and treatment of said injuries, which sum is a reasonable and proper amount therefor, all to the plaintiff's damage in a like amount; that plaintiff is informed and believes and therefore alleges that plaintiff will con-

tinue to incur obligations for the care and cure of said injuries, suffering and pain and that plaintiff is unable to determine the amount of expense or obligations hereafter to be so incurred and therefore respectfully requests leave of court to amend this complaint by proper amendment when the sum has been ascertained.

V.

That as a further direct and proximate result of the carelessness and negligence of the defendants as aforesaid, the plaintiff was unable to engage in any employment for a period of ten (10) days, all to the plaintiff's further damage in the sum of $250.00.

Wherefore, plaintiff Pacific Freight Lines prays judgment as follows:

1. For property damage in the sum of $2,433.51;
2. For loss of use in the sum of $1,555.20;
3. For costs of suit and such other relief as the court may deem just and proper in the premises.

And Plaintiff Sidney S. Russell prays judgment as follows:

1. For pain and suffering the sum of $15,000.00;
2. For medical expenses heretofore incurred in the sum of $168.66;
3. For future medical expenses which plaintiff might incur; and
4. For loss of earnings in the sum of $250.00;
5. For costs of suit and for such other and further relief as to the court may seem just and proper in the premises.

ROBERT W. STEVENSON and
ANTHONY J. CALABRO,
/s/ By ANTHONY J. CALABRO,
Attorneys for Plaintiffs

Duly Verified.

[Endorsed]: Filed October 19, 1954.

[Title of District Court and Cause.]

ANSWER

For Answer to the claim of plaintiff Pacific Freight Lines defendant United States of America, in its own behalf only:

I.

Admits the allegations contained in paragraphs I, II, III and IV of this claim for relief.

II.

Admits "that at all times here material, defendant Eugene A. Phelps was a member of the United States Air Force", as alleged in paragraph V of this claim for relief but denies upon information and belief "that at all times herein mentioned, defendant Eugene A. Phelps was acting in the course and scope of his office as a member of the United States Air Force" as is also alleged in paragraph V of this claim for relief.

III.

Admits "that at all times material herein, the United States Air Force was the owner of a certain

1951 Chevrolet automobile which at all times herein mentioned was being operated by the defendant Eugene A. Phelps" as alleged in paragraph VI of this claim for relief but denies that said operation was at all times "with the permission and consent of said owner" as is also alleged in paragraph VI of this claim for relief.

IV.

Upon information and belief denies the allegations contained in paragraphs VII, VIII and IX of that claim for relief.

For Answer to the claim of plaintiff Sidney S. Russell defendant United States of America, in its own behalf only:

I.

Adopts as its Answer to paragraph I of the claim for relief of Sidney S. Russell the allegations of its Answer to paragraphs I, IV, V, VI and VII of the claim of plaintiff Pacific Freight Lines.

II.

Admits the allegations contained in paragraph II of this claim for relief.

III.

Upon information and belief denies the allegations contained in paragraphs III, IV and V of this claim for relief.

LAUGHLIN E. WATERS,
United States Attorney

MAX F. DEUTZ,
Assistant U. S. Attorney, Chief, Civil Division

/s/ MARVIN ZINMAN,
Assistant U. S. Attorney,
Attorneys for Defendant, United States of America

Affidavit of Service by Mail attached.

[Endorsed]: Filed January 21, 1955.

[Title of District Court and Cause.]

Notice of Motion for Separate Trial; Motion for Separate Trial; Memorandum of Points and Authorities in Support of Motion for Separate Trial.

NOTICE OF MOTION FOR SEPARATE TRIAL

Please Take Notice that the undersigned will move this Court in the courtroom of the Honorable Leon Yankwich, United States Courthouse and Post Office Building, City of Los Angeles, State of California, on the 28th day of February, 1955, at 10:00 a.m. in the morning of that day, or as soon thereafter as counsel can be heard, for an order that a separate trial may be had as between the defendant, United States of America, and the plaintiffs in this action on the issue of scope of employment.

LAUGHLIN E. WATERS,
United States Attorney,

MAX F. DEUTZ,
Assistant U. S. Attorney, Chief,
Civil Division

/s/ MARVIN ZINMAN,
Assistant U. S. Attorney

MOTION FOR SEPARATE TRIAL

Defendant, United States of America, moves the Court to order that the trial date for this action previously assigned, April 12, 1955, be vacated and that pursuant to Rule 42(b) of the Federal Rules of Civil Procedure, that the Court order that a separate trial be had in this case as to the issue of scope of employment. The ground upon which this Motion is based is that a trial of this issue alone will be of convenience to the moving defendant.

LAUGHLIN E. WATERS,
United States Attorney,

MAX F. DEUTZ,
Assistant U. S. Attorney,

/s/ MARVIN ZINMAN,
Assistant U. S. Attorney,

Attorneys for Defendant United
States of America

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SEPARATE TRIAL

An Order for a separate trial of a separate issue may be had where convenience will result.

Rule 42(b) of the Federal Rules of Civil Procedure.

LAUGHLIN E. WATERS,
United States Attorney,

MAX F. DEUTZ,
Assistant U. S. Attorney, Chief,
Civil Division

/s/ MARVIN ZINMAN,
Assistant U. S. Attorney

Affidavit of Service by Mail attached.

[Endorsed]: Filed February 15, 1955.

[Title of District Court and Cause.]

MINUTES OF THE COURT

Date: Feb. 28, 1955, at Los Angeles, Calif.

Present: Hon. Leon A. Yankwich, District Judge; Deputy Clerk: John A. Childress; Reporter: Marie Zellner; Counsel for Plaintiffs: Anthony J. Calabro; Counsel for Defendants: Marvin Zinman, Ass't U. S. Att'y.

Proceedings: For hearing motion of U.S.A., filed

Feb. 15, 1955, for separate trial on issue of scope of employment.

Attorney Zinman argues in support of motion.

Court Orders said motion denied.

EDMUND L. SMITH,
Clerk

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled case having come on regularly for trial on April 12, 1954, before the Honorable Leon R. Yankwich, Judge presiding;

The plaintiffs having appeared by their attorneys, Robert W. Stevenson and Anthony J. Calabro;

The defendant, United States of America, having appeared by its attorneys, Laughlin E. Waters, United States Attorney, Max F. Deutz, Assistant United States Attorney, Chief of Civil Division, and Joseph D. Mullender, Jr., Assistant United States Attorney;

The defendant, Eugene A. Phelps, having appeared by his attorney, Donald Wheeler;

The Court having considered all of the pleadings filed herein, the evidence offered by the parties at the time of trial, and the arguments of counsel;

And the Court being fully advised in the premises, hereby makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

I.

On February 4, 1954, the defendant, Eugene A. Phelps, was an Airman in the United States Air Force, stationed at George Air Force Base, Victorville, California, and was employed as a driver in the motor pool at said Air Force Base.

II.

On said date at approximately 3:00 o'clock p.m., the United States Air Force dispatched to defendant Eugene A. Phelps, a 1951 Chevrolet automobile, owned by the defendant, United States of America, and ordered him to drive an Air Force officer, Lt. Col. Philip E. Joyal, from George Air Force Base to the International Airport in Los Angeles, California, and to return immediately to George Air Force Base after the officer had been delivered to said Airport.

III.

Los Angeles, California is located at a point which is approximately 115 miles west of George Air Force Base.

IV.

After beginning the trip to Los Angeles, California, Lt. Col. Joyal ordered the defendant, Eugene A. Phelps, to deliver him to the Biltmore

Hotel in Los Angeles instead of taking him to Los Angeles International Airport.

V.

On said date of February 4, 1954, at approximately 6:00 o'clock p.m., the defendant, Eugene A. Phelps, delivered Lt. Col. Joyall to the Biltmore Hotel, and began making the return trip in a general easterly direction toward George Air Force Base.

VI.

On said date at approximately 7:00 o'clock p.m., the defendant, Eugene A. Phelps, stopped in Pasadena, California, and had dinner, after which he again continued on the return trip in a general easterly direction toward George Air Force Base.

VII.

On said date at approximately 9:00 o'clock p.m., the defendant, Eugene A. Phelps, stopped again in a cafe in San Bernardino, California, where he remained until approximately 12:00 o'clock midnight.

VIII.

On said date at approximately 12:00 o'clock midnight, defendant, Eugene A. Phelps, again continued on the return trip in a general easterly direction toward George Air Force Base.

IX.

When the defendant, Eugene A. Phelps, arrived

at the junction of United States Highways 395 and 66, he stopped and picked up a hitchhiker.

X.

After picking up the hitchhiker, the defendant, Eugene A. Phelps, asked him to drive the car, and the hitchhiker drove the car in a general easterly direction on United States Highway 66.

XI.

After the hitchhiker began to drive, the defendant, Eugene A. Phelps, went to sleep.

XII.

When the defendant, Eugene A. Phelps, awoke, it was 5:00 o'clock a.m., February 5, 1954, and he and the car were in Barstow, California.

XIII.

Barstow, California is located on United States Highway 66, approximately 35 miles east of the point where the road to George Air Force Base intersects United States Highway 66.

XIV.

Upon waking up at Barstow, California, the defendant, Eugene A. Phelps, began driving the car in a general westerly direction on United States Highway 66.

XV.

At approximately 5:15 o'clock a.m., on February 5, 1954, the defendant, Eugene A. Phelps, was driv-

ing in a general westerly direction on United States Highway 66 and was at a point approximately ten miles west of Barstow, California, and 25 miles east of the point on United States Highway 66, where said Highway is intersected by the road to George Air Force Base.

XVI.

At said time and place, a Sterling tank truck, owned by the plaintiff, Pacific Freight Lines, and operated by the plaintiff, Sidney S. Russell, was proceeding in a general easterly direction on United States Highway 66, and approaching the 1951 Chevrolet automobile, owned by the defendant, United States of America, and operated by the defendant Eugene A. Phelps.

XVII.

At said time and place the defendant, Eugene A. Phelps, negligently operated the 1951 Chevrolet automobile and caused it to cross over the center line of the Highway and to collide with the Sterling tank truck on the south side of the highway.

XVIII.

As a direct and proximate result of the collision and of the negligence of the defendant, Eugene A. Phelps, the Sterling tank truck was damaged, and the plaintiff, Sidney S. Russell, suffered personal injuries.

XIX.

The reasonable and necessary cost of repairing

the damage caused to the Sterling tank truck was $2,433.51.

XX.

The reasonable and necessary cost of transferring the load in the tank truck to another truck and of supervising the transfer was $275.36.

XXI.

The reasonable rental value of the tank truck for the time necessary to repair it was $1,555.20.

XXII.

The reasonable and necessary medical expenses incurred by the plaintiff, Sidney S. Russell, by reason of the personal injuries caused by the collision were $168.66.

XXIII.

The plaintiff, Sidney S. Russell, suffered general damages from pain and suffering caused by the collision in the sum of $1,500.00.

XXIV.

The defendant, Eugene A. Phelps, was not acting within the scope of his office or employment at the time of the collision.

Conclusions of Law

I.

The plaintiff, Pacific Freight Lines, is entitled to a judgment against the defendant, Eugene A. Phelps, in the total sum of $4,264.07, and for its costs of suit.

II.

The plaintiff, Sidney S. Russell, is entitled to a judgment against the defendant, Eugene A. Phelps, in the total sum of $1,668.66, and for his costs of suit.

III.

The defendant, United States of America, is entitled to a judgment against the plaintiffs, Pacific Freight Lines and Sidney S. Russell, and each of them, dismissing their Complaint, and for its costs of suit.

Dated this 4th day of May, 1955.

/s/ LEON R. YANKWICH,
United States District Judge

Submitted by:

/s/ Joseph D. Mullender, Jr.,
Assistant U. S. Attorney, Attorney for Defendant, United States of America.

Approved as to Form this 23rd day of April, 1955:

/s/ Anthony J. Calabro,
Attorney for Plaintiffs, Pacific Freight Lines and Sidney S. Russell.

Approved as to Form this 29 day of April, 1955:

/s/ Donald E. Wheeler,
Attorney for Defendant, Eugene A. Phelps.

[Endorsed]: Filed May 4, 1955.

In the United States District Court for the Southern District of California, Central Division

Civil No. 17356-Y.

PACIFIC FREIGHT LINES and SIDNEY S. RUSSELL, Plaintiffs,

vs.

EUGENE A. PHELPS, UNITED STATES OF AMERICA, Defendants.

JUDGMENT

The above-entitled case having come on regularly for trial on April 12, 1954, before the Honorable Leon R. Yankwich, Judge presiding;

The plaintiffs having appeared by their attorneys, Robert W. Stevenson and Anthony J. Calabro;

The defendant, United States of America, having appeared by its attorneys, Laughlin E. Waters, United States Attorney, Max F. Deutz, Assistant United States Attorney, Chief of Civil Division, and Joseph D. Mullender, Jr., Assistant United States Attorney;

The defendant, Eugene A. Phelps, having appeared by his attorney, Donald Wheeler;

The Court having considered all of the pleadings filed herein, the evidence offered by the parties at the time of trial, and the arguments of counsel;

And the Court being fully advised in the premises, and having made written Findings of Fact and Conclusions of Law:

It is hereby ordered, adjudged and decreed:

That the plaintiff, Pacific Freight Lines, do have and recover of and from the defendant, Eugene A. Phelps, the total sum of $4,264.07, plus its costs of suit.

That the plaintiff, Sidney S. Russell, do have and recover of and from the defendant, Eugene A. Phelps, the total sum of $1,668.66, plus his costs of suit.

That the defendant, United States of America, have judgment against the plaintiffs, Pacific Freight Lines and Sidney S. Russell, and each of them, dismissing their Complaint, and for its costs of suit.

Dated this 4th day of May, 1955.

/s/ LEON R. YANKWICH,
United States District Judge

Submitted by:
/s/ Joseph D. Mullender, Jr.,
Assistant U. S. Attorney, Attorney for Defendant, United States of America

Approved as to Form this 23rd day of April, 1955:
/s/ Anthony J. Calabro,
Attorney for Plaintiffs, Pacific Freight Lines and Sidney S. Russell

Approved as to Form this 29 day of April, 1955:
/s/ Donald E. Wheeler,
Attorney for Defendant Eugene A. Phelps.

[Endorsed]: Filed May 4, 1955. Entered May 6, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given this 25th day of May, 1955 that Pacific Freight Lines and Sidney S. Russell, plaintiffs, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the judgment of this Court entered on the 6th day of May, 1955, in favor of the defendant United States of America and against said plaintiffs.

Dated: May 25, 1955.

ROBERT W. STEVENSON and
ANTHONY J. CALABRO,

/s/ By GEORGE W. KELL,

Attorneys for Plaintiffs

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 27, 1955.

[Title of District and Cause.]

CERTIFICATE OF CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 31, inclusive, contain the original

Complaint;

Answer;

Motion and Notice of Motion and Memo of Points and Authorities in Support of Motion for Separate Trial;

Findings of Fact and Conclusions of Law;

Judgment;

Notice of Appeal;

Stipulation enlarging Time to File Designation;

Designation of Contents of Record on Appeal;

Statement of Points; which together with a full, true and correct copy of Minutes of the Court had on February 28, 1955; one volume of reporter's transcript of proceedings; defendant's exhibit A; and plaintiff's exhibits 1 to 4, inclusive, in the above-entitled cause, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in said cause.

I further certify that my fees for preparing the foregoing record amount to $2.00, the sum of which has been paid by appellants.

Witness my hand and the seal of said District Court, this 25th day of October, 1955.

[Seal] JOHN A. CHILDRESS,
Clerk

/s/ By CHARLES E. JONES,
Deputy

In the United States District Court for the Southern District of California, Central Division

No. 17,356-Y.—Civil

PACIFIC FREIGHT LINES and SIDNEY S. RUSSELL, Plaintiffs,

vs.

EUGENE A. PHELPS, and UNITED STATES OF AMERICA, Defendants.

TRANSCRIPT OF PROCEEDINGS

Los Angeles, California, Tuesday, April 12, 1955

Honorable Leon R. Yankwich, Judge presiding.

Appearances: For the Plaintiffs: Robert W. Stevenson and Anthony J. Calabro, by Anthony J. Calabro, 3257 Wilshire Blvd., Los Angeles 5, Calif. For the Defendant Eugene A. Phelps: Donald E. Wheeler, 106 West Third St., Los Angeles 13, Calif. For the Defendant United States of America: Laughlin, E. Waters, U. S. Attorney, by Joseph D. Mullender, Jr., Asst. U. S. Attorney. [1*]

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* Page numbers appearing at top of page of original Reporter's Transcript of Record.

SIDNEY SPRINGER RUSSELL

the plaintiff herein, called as a witness in his own behalf, having been first duly sworn, testified as follows:

The Clerk: Your full name, sir?

The Witness: Sidney Springer Russell.

Direct Examination

* * * * * [9]

Q. (By Mr. Calabro): What day was it, Mr. Russell, that this accident occurred?

A. February 5, 1954.

Q. Where were you going at the time of the accident?

A. I was going to Ludlow, California.

Q. In which direction were you traveling?

A. I was traveling east.

Q. What were you driving—what type of equipment? [10]

A. A tank truck and trailer, Sterling.

Q. How many units did that consist of?

A. Two.

Q. What time of the day did the accident happen?

A. At about 5:00 o'clock in the morning. [11]

* * * * *

Cross Examination

Q. (By Mr. Mullender): Mr. Russell, could you tell us about how far the scene of the accident was from Barstow?

A. I think it was about ten miles. I believe the

(Testimony of Sidney Springer Russell.)

man that came out from our office said that it was eleven miles to the Barstow Hospital.

Q. And this accident occurred on Highway 66, did it? A. Yes, sir.

Q. And that road does run straight to Barstow, does it? A. That's right.

Q. You were headed in the direction towards Barstow; is that correct? A. That's right.

Q. What was the last town that you had passed before the scene of the accident?

A. I would say Victorville is the last town. There is Helendale and little things like that, but they are just service stations, that's all.

Q. How far back was Victorville?

A. I would say it was about 25 miles.

Q. So that you were at a point on Highway 66 between [26] Victorville and Barstow, approximately 25 miles from Victorville and ten miles from Barstow? A. That's right.

Q. Do you know where George Air Force Base is in relation to those places?

A. Yes, I do.

Q. Is George Air Force Base off of Highway 66? A. It is, yes.

Q. And is there a road from Highway 66 which goes to George Air Force Base?

A. Yes, there is.

Q. And had you passed that road?

A. Yes, I had.

Q. About how far back was that from the scene of the accident?

(Testimony of Sidney Springer Russell.)

A. Anyway 20 miles, maybe more than that, 25 miles.

Q. It is the other side of Victorville; isn't it?

A. Between Victorville—there is one road that turns off between Victorville and Barstow. It is about three miles, I guess, out of Victorville, east of Victorville, that you turn off to go to George Air Force Base.

Q. That turn-off was between Victorville and the scene of the accident?

A. Yes, that right. [27]

* * * * *

Q. And you say the accident occurred about 5:00 a.m. in the morning of February 5th?

A. That's right, yes, sir.

* * * * *

GEORGE HAAG

called as a witness on behalf of the plaintiffs, having been first duly sworn, was examined and testified as follows: [29]

* * * * *

Direct Examination

Q. (By Mr. Calabro): Mr. Haag, what is your address, please?

A. Box 9, Helendale, California.

Q. Where is Helendale?

A. Helendale is approximately fourteen miles east of Victorville, and about the same distance from Barstow to it.

(Testimony of George Haag.)

The Court: It is in San Bernardino County?

The Witness: Yes, sir.

Q. (By Mr. Calabro): Did you witness the happening of an accident that occurred on February 5, 1954, on Highway 66 between Victorville and Barstow? A. I did.

Q. What time of the day did the accident happen?

A. Well, I don't know as I exactly noticed the time, but it was after 5:00 o'clock a.m. I would say between 5:00 and 5:30.

Q. Was it still dark, or daylight?

A. Dark.

Q. What were you doing?

A. I was on my way to work.

Q. Where was work at the time?

A. United States Government, Barstow Marine Base.

Q. What was your occupation?

A. Carpenter. [30]

Q. What were you driving?

A. A Chevrolet '38.

Q. Was that a 1938 Chevrolet?

A. Yes, sir, a 1938 Chevrolet.

Q. In which direction were you traveling?

A. East.

Q. And you come from Helendale?

A. Yes, sir.

Q. Were you living there at the time?

A. Yes, sir.

(Testimony of George Haag.)

Q. On what highway were you traveling?

A. 66. [31]

* * * * *

NORBERT J. SCHUERMANN

called as a witness on behalf of the defendant United States of America, having been first duly sworn, was examined and testified as follows:

* * * * *

Direct Examination

Q. (By Mr. Mullender): Mr. Schuermann, what is your business or occupation? [74]

A. I am a State traffic officer for the State of California.

Q. How long have you been so employed?

A. Since February of '52.

Q. Calling your attention to the date of February 5, 1954, did you investigate an accident which occurred on Highway 66 in the vicinity of Barstow?

A. Yes, I did.

Q. What time did you arrive at the scene of the accident? A. If I may——

Q. Will you please refer to your notes?

A. Our arrival was approximately 6:00 o'clock.

Q. Do you know what time that accident occurred?

A. We estimated the time of the accident was approximately 5:15 a.m.

Q. How did you arrive at that estimate?

A. By the statements of the witness and the driver.

(Testimony of Norbert J. Schuermann.)

Q. What time did you receive the call to report there? A. 5:30 a.m.

Q. Will you describe the vehicles that were involved in that accident?

The Court: Tell us, first, about the condition of the weather, that is, how was it? Was it light?

The Witness: Upon our arrival it was just getting daylight. [75]

The Court: Getting daylight?

The Witness: At the time of the accident it would be still dark.

The Court: But that part of the country, that desert, has a dawn that we don't have here in Los Angeles?

The Witness: Yes, but I mean at that time in the morning you still need your lights.

The Court: It is still pretty dark. All right.

The Witness: And the weather was clear, no smog or fog, and the visibility was unlimited in that section of the highway.

Q. (By Mr. Mullender): Will you describe the vehicles that were involved in that accident?

A. One was a 1951 Chevy four-door sedan, and the other was a Sterling tank truck and a trailer.

Q. Was there any indication on the tank truck and trailer as to who owned it?

A. Yes, there was.

Q. What was that?

A. The initials "PFL".

Q. Was there any indication on the Chevrolet as to who owned that car?

(Testimony of Norbert J. Schuermann.)

A. The color, and also "U. S. Air Force," and the identifying numbers "172892" were stencilled on the doors.

Q. From what you observed at the scene of the accident, [76] could you determine the directions of travel of the two vehicles prior to the collision?

A. From the tanker you could trace its path both previous to impact and after impact. There was nothing to indicate—no skid marks, or anything, to indicate the path of the Air Force vehicle prior to impact, and a series of gouge marks after impact to where it came to rest.

Q. Where did it appear that the truck had been struck?

A. The truck had been struck in the front portion; in other words, the bumper and the front portion of the vehicle.

Q. And was the truck proceeding east on Highway 66?

A. Yes, that is correct, proceeding east.

Q. Then did you conclude that the Government vehicle had been proceeding in the opposite direction? A. Yes.

Mr. Mullender: Your Honor, I would like to have Mr. Schuermann draw on the blackboard the relative place of this accident.

The Court: All right. He can draw his own if he does not like the diagram drawn there. You can turn the board around. There is another blackboard on the back. You can draw your own.

(Testimony of Norbert J. Schuermann.)

The Witness: May I have a piece of chalk?

The Court: Isn't there some chalk there in front?

(The chalk was handed to the witness.) [77]

Q. (By Mr. Mullender): Now, what I would like to have you do, Mr. Schuermann, is indicate on the blackboard Los Angeles, San Bernardino, George Air Force Base, and Barstow and Highway 66.

A. I will start with Los Angeles down here, and San Bernardino lies more or less just east of here. Then you go up over the pass, Cajon Pass, over to Victorville, and then continue on more or less east to approximately two miles outside of Victorville, with the road coming in—it would be on the left hand side as you were traveling east, and that is the George Air Force road, approximately two miles. Then it continues on, and placing Barstow here, the "d.c." approximately ten miles west of Barstow.

Q. All right. Will you mark "Barstow"?

A. All right. Barstow, Victorville.

Q. Now, will you indicate the distance in miles between Los Angeles and San Bernardino, please?

A. It is approximately 75 miles.

Q. And will you indicate the distance in miles from San Bernardino to Victorville?

A. Approximately 39 miles.

Q. Now, will you indicate the distance between

(Testimony of Norbert J. Schuermann.)

Victorville and the road that turns off to George Air Force Base?

A. It is approximately two miles.

Q. And will you indicate the distance between that [78] point and the place which you have marked as the scene of the accident?

A. Well, that would be approximately 24 or 25 miles.

Q. Will you indicate now the estimated mileage from the scene of the accident to Barstow?

A. That is approximately ten miles.

Q. Now, in light of your testimony, prior to drawing this diagram, is it true that the Government vehicle was proceeding from Barstow back toward George Air Force Base?

A. That's right.

Q. And the truck was proceeding in the direction from Victorville towards Barstow?

A. That is correct.

Mr. Mullender: I have no further questions.

The Court: All right.

Mr. Calabro: May I see the report that you used to refresh your memory from, please, Mr. Schuermann?

The Witness: Surely. (Handing document to counsel.)

The Court: You consulted it only about the date?

The Witness: About the date, the number on

(Testimony of Norbert J. Schuermann.)

the Air Force vehicle, and the description of the other vehicle.

The Court: So far as the location and what you found, that you gave from your recollection?

The Witness: Yes, sir. [79]

* * * * *

BERNARD R. SNYDER

called as a witness on behalf of the defendant United States of America, having been first duly sworn, was examined and testified as follows:

The Clerk: Your full name, sir?

The Witness: Bernard R. Snyder.

Mr. Calabro: I am sorry, Mr. Witness. I didn't hear you.

The Witness: Bernard R. Snyder.

The Clerk: How do you spell Snyder?

The Witness: S-n-y-d-e-r.

Direct Examination

Q. (By Mr. Mullender): Mr. Snyder, what is your business or occupation?

A. United States Air Force, Transportation Supervisor.

Q. How long have you been employed in that capacity?

A. Approximately eleven years now.

Q. Where are you stationed?

A. George Air Force Base.

Q. How long have you been stationed there?

A. Eighteen months. [84]

Q. Mr. Snyder, calling your attention to the

(Testimony of Bernard R. Snyder.)

date of February 4, 1954, do you recall receiving any orders regarding the dispatch of an automobile? A. Yes, sir.

Q. And will you tell me what your orders were regarding dispatching automobiles on that day?

Mr. Calabro: To which we object on the ground that would constitute hearsay in regard to the plaintiffs, your Honor. I think what he might have been told by any of his superiors as against us, the two plaintiffs, would certainly be hearsay.

The Court: Oh, no. In all cases of this character, you want to remember that under the Federal Tort Claims Act, the test of liability is the same as that of a private employer under the law of the State.

Now, in case you sued an employer, the employer would have the right to show whether the employee was doing something that was required of him or not, and, of necessity, all those things would be hearsay as to you, and yet if they were not admissible, it would go by appearances, and merely say it was an Army truck, and, therefore, you could not get behind it. What they are going to show is whether this man was about Government business, whether he had authority to use the automobile, and that is always the case.

Mr. Calabro: I think it would be proper for this witness to testify as to what orders he may have given, but I don't [85] think that it is proper for him to testify as to what he was told.

The Court: Oh, it is very important to show, you

(Testimony of Bernard R. Snyder.)

know, what they call the chain of command in the Army. Weren't you in the Army?

Mr. Calabro: Well, I was subject to military regulations, but not by the Army.

The Court: Not by the Army, all right. But you know the chain of command is of great importance.

Mr. Calabro: Yes.

The Court: And it is important in this case to show authority, and to show the right to use the automobile.

Mr. Calabro: Well, I think that the defense has a right to introduce whatever evidence they can in so far as the orders that were given by this particular witness, but I don't——

The Court: How do we know he had authority to give them? He is going to show he was asked to do certain things, and that he did them in pursuance to that. Otherwise the question would arise as to whether he had authority. Do you see the point?

Mr. Calabro: I see the court's position, but I think the proper testimony in order to establish that prior order, if such were necessary, would come from the person who issued the order.

The Court: Oh, no. He can't testify to the orders, but [86] he can state that he was ordered to provide this or that. I don't know what his testimony is going to be.

Mr. Calabro: I don't either, your Honor, but I think it would be objectionable as hearsay.

The Court: No. Go ahead. Overruled.

The Witness: I was called from my headquar-

(Testimony of Bernard R. Snyder.)

ters, my superiors, to have a car proceed to the officers' billets and pick up a Colonel Joyal, and to proceed on to the International Airport at approximately between 1500 and 1600 hours in the afternoon.

Q. (By Mr. Mullender): After receiving that order, what did you do?

A. I wrote out a little mimeographed form we have in the transportation office, the person to whom it was to report to, who authorized it, and what time, and where he was to proceed to, and I immediately took that over to my dispatch office, and told my dispatcher to have one staff car proceed at the designated time.

Q. Did you give your dispatch man any specific instructions as to what he was to do, other than you have testified to?

A. To have it there on time, sir, that was all I said, and I told him the airman would take it.

The Court: What is the distance from where you were to the International Airport? [87]

The Witness: It is a little over 100 miles, sir.

The Court: All right.

Q. (By Mr. Mullender): Then the sum and substance of your order, which you had given, was to have the dispatch man make a car and a driver available to this officer at George Air Force Base to drive him to the International Airport?

A. Yes, sir.

Q. And was there any order given as to what

(Testimony of Bernard R. Snyder.)

the driver of that car was to do after he had taken the officer to the International Airport?

A. He was told to proceed to International Airport and return.

Q. And what time did this occur, again?

A. This——

Q. What time of day?

A. The telephone call, sir, that I received?

Q. The time that you dispatched the car.

A. It was between 1500 and 1600. In other words, 3:00 o'clock in the afternoon, or 4:00, along in there; approximately in there.

Q. 3:00 or 4:00 o'clock in the afternoon, or shortly thereafter? A. Yes, sir.

Q. Did you know at that time who the driver was that was finally dispatched with the car? [88]

A. Yes, sir. I knew the only man available at the present time.

Q. And who was that?

A. Airman Phelps.

Q. Is his name Eugene A. Phelps?

A. Yes, sir.

Q. Do you recall what happened after that, to your personal knowledge?

A. I beg your pardon?

Q. Do you recall, from your personal knowledge, what happened after that in regard to the dispatching of this car? A. No, sir.

Mr. Mullender: That is all.

(Testimony of Bernard R. Snyder.)

Cross Examination

Q. (By Mr. Calabro): What is your rank, Mr. Snyder? A. Tech. Sergeant.

Q. You got a call then, as I understand it, between 3:00 and 4:00 o'clock on that afternoon to have the car pick up an officer?

A. It was right in there.

Q. What time was the car supposed to pick up the officer? [89]

A. Approximately at that same time, sir.

Q. As soon as possible? A. Yes, sir.

Q. You didn't actually dispatch the car, but you just gave an order to somebody else to send Phelps out, is that right? A. That's right.

Q. So you don't know what time Phelps left, do you?

A. It was approximately right around in there, some time in there.

Q. Were you there when the order was given to Phelps?

A. That's right. I was the one that told Phelps to drive the car.

Q. It was not the dispatcher, then?

A. No.

Q. Were you the one that told him to go to Los Angeles and to pick up Officer Joyal?

A. I told him where to report to, sure did, and to slip into the dispatch office for a log purpose for the 90-day period.

Q. I see. But you actually had the conversation with Phelps before he left the Base?

(Testimony of Bernard R. Snyder.)

A. That's right, sir.

Q. What was Phelps' rank at that time?

A. I believe it was Airman Second Class. I am pretty [90] sure on that.

The Court: Is that an air depot there, or what is that?

The Witness: A Tactical Air Command, sir.

The Court: It is a Tactical Air Command?

The Witness: Yes, sir.

The Court: Does it have a name?

The Witness: George Air Force Base.

The Court: And the location?

The Witness: Victorville, California.

The Court: It is not exactly in Victorville, is it?

The Witness: No, sir. It is approximately five miles from Victorville.

The Court: As you go over the hill?

The Witness: Yes, sir. It is southwest, more or less, or I mean southeast.

The Court: You go over that big hill, and then it is beyond that?

The Witness: Yes, sir.

Mr. Mullender: May I show him the diagram, your Honor?

The Court: I beg pardon?

Mr. Mullender: May I show him the diagram drawn by the police officer, and ask him if that correctly shows George Air Force Base?

The Court: All right.

Mr. Mullender: Mr. Snyder, I show you a diagram which [91] was drawn by Officer Schuermann,

(Testimony of Bernard R. Snyder.)

and he has indicated here that this line represents Highway 66, and that this rectangular square represents George Air Force Base, that this distance between George Air Force Base and the Highway is approximately four miles; that this point is Victorville, and the distance between the intersection of the road and Victorville is approximately two miles. Does that fairly represent the location of George Air Force Base?

The Witness: Yes, sir, it sure does. It sure does.

Mr. Calabro: Are you through?

Mr. Mullender: Yes.

Q. (By Mr. Calabro): You just got through telling us, Mr. Snyder, that at that time Mr. Phelps was what you called an airman second class. How many stripes would that entitle him to on his arm, sir? A. Two, sir.

Q. And what were his regular duties?

A. A driver, sir.

Q. Was he assigned to a car pool or a car detail of some sort?

A. He was assigned to the staff car section.

Q. What does that mean, the staff car section?

A. That means sedans, light and medium sedans.

Q. His regular duties then were to drive officers, as he was ordered to drive them, either to or from or within [92] or outside the Base?

A. That's right, sir.

Q. In order to entitle him to leave the Base, was he given some sort of authority, or permit, or pass?

(Testimony of Bernard R. Snyder.)

A. DD Form 110, sir, and my authority is to pass on them by my superiors.

Q. You used some letters and a number that really don't mean too much to me, Mr. Snyder. Would you tell me a little more about that?

A. That is your dispatch record. It gives the man's name, the type of equipment he is driving, and also the registration number, the date, and his destination.

Q. Then does he use this pass to show the man that he is leaving the Base? A. Yes, sir.

Q. And when he comes back into the Base?

A. Right, sir.

The Court: That is also his authority if he is hailed or hauled in by an M.P. who is wondering what he is doing away from his Base?

The Witness: That's right.

The Court: That is to show that he has a right to the pass and be away from the Base?

The Witness: Yes, sir.

The Court: And it is also a pass for the equipment? [93]

The Witness: That's right, sir.

Q. (By Mr. Calabro): So that it is a pass in the sense that it is a pass for him to be off of the Base while he is still actually on duty?

A. That's right, sir.

Q. Is it distinguished in any way from a liberty pass, or what is commonly known as a liberty pass?

A. It sure is, sir.

Q. Can you tell us what the distinction is?

(Testimony of Bernard R. Snyder.)

A. Well, it is an orange slip of paper, approximately six by ten inches.

Q. I am thinking in terms of effect rather than appearance.

A. In effect there is quite a bit of difference between a liberty pass and a driver's trip ticket. As I say, it has the date, the type of equipment, the registration number, and your admission number on your Form 9-75, which is your master log for each time the equipment goes out, and it has your number.

Q. Is it fair to say, Mr. Snyder, that a trip ticket is intended to regulate the conduct of the airman while he is off the Base, whereas a pass is intended merely for permission to leave the Base, and for the airman to do as he pleases while he is gone?

A. Yes, sir. It is to authorize him to be off the [94] Base or drive the vehicle on the Base out of the pool, and it logs your personnel you carry, the amount of gasoline you carry and your oil, and with your tonnage and poundage on it.

Q. Would you tell me whether or not—do you have the trip ticket with you?

A. No, sir, I sure don't.

Q. Does the trip ticket say anything to Mr. Phelps about how he is to return, or what road or route he is to follow?

A. No, sir. He is supposed to take the shortest and quickest route.

Q. That is not stated on the trip ticket?

(Testimony of Bernard R. Snyder.)

A. No, sir.

Q. Was there anything on the ticket that said he was not to return by going to Barstow first and then coming back?

A. Not to my knowledge, there wasn't.

The Court: Did he have to go through Barstow either way?

The Witness: No, sir.

The Court: Barstow, as a matter of fact, is out of the way?

The Witness: Right, sir.

Q. (By Mr. Calabro): Was there any type of order given to Mr. Phelps indicating at what time he was to return to the [95] Base?

A. No, sir.

Q. And is it fair to say, Mr. Snyder, that Mr. Phelps drove from George Air Force Base and left there at approximately 4:00 p.m., or some time prior thereto? A. Yes, sir.

Q. Were any arrangements——

The Court: How do you estimate the time it actually takes from the Base to the Airport?

The Witness: It all depends, sir, on what time of day you leave.

The Court: Supposing it was the middle of the afternoon, and when you are not likely to have much travel.

The Witness: In the middle of the afternoon, you would catch just about the off-duty time for people here in Los Angeles. We allow about three and one-half hours, sir.

(Testimony of Bernard R. Snyder.)

The Court: About three and one-half hours.

Q. (By Mr. Calabro): Is that one way?

A. Yes, sir.

Q. Was Mr. Phelps given any instructions in connection with his evening meal?

A. What do you mean by that, sir?

Q. Well, you testified that he left before 4:00 o'clock, so I am just assuming that he had not yet had what you would ordinarily call chow, so I am wondering whether or not there [96] were any instructions given to Mr. Phelps about when and where he was to have his evening meal.

A. The usual procedure on that, sir, when you are carrying an officer——

Q. I am sorry, Mr. Snyder, and I didn't mean to interrupt you that way, but I am just wondering what was done in this particular case.

The Court: I think the Sergeant should be allowed to explain what the procedure is, because we almost take judicial notice that there is a pattern that is followed, and that no particular instructions are given. He ought to tell us what is the rule in regard to what a man is to do who is away from camp for his evening meal.

Mr. Calabro: Your Honor, I think that the court is entitled to the benefit of the testimony concerning what, if any, specific directions were given, and then assuming there were none,——

The Court: I also take judicial notice of the fact that in the Army, like in any large organiza-

(Testimony of Bernard R. Snyder.)

tion, they do not handle these matters on an individual basis, and there must be rules.

Mr. Calabro: I see. I didn't know that the court was going to take judicial notice of those facts, because I was not aware of it.

The Court: It is one of the ordinary things of life, [97] but still I am not saying, and I just assumed it is so, that if a man is sent out to do 100 miles at 4:00 o'clock, there must be some rules or regulations as to where he is going to get his meal, and that it isn't likely that the officer is going to invite the private to have dinner with him at his club, or when he gets to his destination.

Mr. Calabro: This was a two-striper, your Honor.

The Court: That does not make any difference. He is still not an officer. I assume this was a Captain or a Colonel he was transporting. Who was he transporting?

The Witness: A Lieutenant-Colonel.

The Court: A Lieutenant-Colonel. He is still not a social equal, and he could not enter the Officers Club by the front door. I know, because I was a sergeant in the first World War, and I still remember the distinction.

Let's get back to it. If you want him to answer whether he was given anything, I will let him answer that.

Mr. Calabro: Yes, I think we should have him answer that question.

The Court: You can ask him if he was given

(Testimony of Bernard R. Snyder.)

anything special, and then if he says no, you can ask if there was any general pattern or rule so that the driver would know about it. Go ahead.

The Witness: No, there is no orders given out, but the usual procedure on that is that an officer,—a normal officer [98] will donate the man the money for him to get himself something to eat. That has been it in the past.

The Court: On the trip?

The Witness: Yes, sir. Of course, they don't eat with them.

The Court: Naturally.

The Witness: If they give the money to him, they go ahead and eat, but under conditions where they don't do it, he just has to wait until he gets back till he gets something to eat.

Q. (By Mr. Calabro): Unless he can afford to get it on himself? A. That's right.

Q. Then while Mr. Phelps is driving this automobile out of the Base, he has with him this trip ticket all the time; is that right?

A. Yes, sir.

Q. Then he turns it in after he gets back to the Base? A. Yes, sir.

The Court: Do you make an estimate when a soldier—let's call him that, and I like that general appellation——

The Witness: That's all right, sir.

The Court: When a soldier is sent out on a trip that you figure should take three and one-half

(Testimony of Bernard R. Snyder.)

hours each way, do you sort of make an estimate as to when he ought to be [99] back in camp?

The Witness: Well, we don't try to estimate it too close, due to the fact you have to allow for breakdowns and flat tires, or if something is wrong with the vehicle. On that occasion they will call to the Base and notify somebody there.

The Court: But he is not presumed—aside from possibly taking time out to eat, he is not presumed to stay out overnight——

The Witness: That's right.

The Court: ——with the equipment, but he is presumed to come right back?

The Witness: That's right.

The Court: And to feed himself on the way, unless he has something unusual happen, in which event he calls in?

The Witness: Right, sir. That's right, sir.

The Court: So that assuming that he left, say, at 4:00 o'clock, and allowing him from seven to eight hours,—if you allow him eight hours, that would be the maximum that it would take, allowing for his time to eat, and so forth, and stops, and he should be back in camp within eight hours after the time he left? Is that a correct computation?

The Witness: Yes, sir.

The Court: And then, of course, he checks in, and he would check in the hour when he gets back?

The Witness: That's right, sir. [100]

The Court: The sentry would check him in when he got in, and you would note then the hour?

(Testimony of Bernard R. Snyder.)

The Witness: Right, sir.

The Court: All right.

Q. (By Mr. Calabro): Then, Officer Snyder,—I am sorry, Mr. Snyder, I take it, it is proper under your regulations for Airman Phelps to have accepted a dollar, or $2.00 or something from this Lieutenant-Colonel Joyal for his meal for the evening; is that right? A. Yes, sir.

Q. And it would have been perfectly proper for Airman Phelps to stop somewhere after he had delivered Lieutenant-Colonel Joyal to the airport for his evening meal?

A. That's right, sir.

Q. And whatever time that would require, sir, would have been proper?

A. That's right, sir.

Q. Then outside of his meal and whatever breakdown trouble, if any, he had, why, his duty was to return this piece of equipment to the Base as soon as was reasonably possible?

A. Yes, sir; that's right, sir.

Mr. Calabro: No further questions. Thank you.

The Court: Any redirect?

Mr. Mullender: I was going to ask Mr. Snyder, your Honor, [101] about this trip ticket counsel has referred to.

The Court: All right.

Redirect Examination

Q. (By Mr. Mullender): Mr. Snyder, you say

(Testimony of Bernard R. Snyder.)

a trip ticket or Form DD 110 was prepared and given to Mr. Phelps; is that correct?

A. That's right, sir.

Q. When that trip ticket comes back when Phelps returns, would that normally go into the motor pool?

A. Yes, sir, go into the dispatch office, sir.

Q. And you say you don't have it with you today. Is there any reason why you do not?

A. Yes, sir. I don't know, but it seems as though it got lost somewhere on the way on this investigation that was being made on the accident the vehicle was involved in, and the whereabouts of it I don't know now.

Q. So the original ticket has been lost?

A. Yes, sir.

The Court: The chances are because he was hurt nobody bothered to search his pockets for that, and they were more interested in taking care of him. Isn't that true?

The Witness: Well, sir, it was picked up, but it was in a very frayed condition. It had been pretty well torn, and we tried to Scotch tape it back, but it was almost impossible. [102]

The Court: You remember seeing it then?

The Witness: Yes, sir.

Mr. Mullender: We have a copy of the trip ticket, your Honor, which I would like to show the witness.

The Court: All right. Is that a sample, or an actual copy?

(Testimony of Bernard R. Snyder.)

Mr. Mullender: No, it is an actual copy.

The Court: An actual copy, all right.

Mr. Mullender: It was a copy that was made before the original disappeared.

The Court: All right.

Mr. Mullender: I will ask the Clerk to mark this document for identification.

The Clerk: Defendants' A.

(Thereupon the document referred to was marked Defendants' A, for identification.)

Q. (By Mr. Mullender): Mr. Snyder, I show you Defendants' Exhibit A, for identification, which purports to be a copy of a Government form, and I ask you whether or not that represents a true copy of the trip ticket about which you have been testifying?

A. Yes, sir; it sure does, sir.

Q. Mr. Snyder, you will note that the time out is indicated as 1500.

A. Yes, sir. That is 3:00 o'clock, sir. I said between [103] 1500 and 1600 he departed, sir.

Q. You remember independently of this document that the time was approximately that time?

A. Yes, sir.

Q. I see here the signature of a man by the name of Partch. A. Yes, sir.

Q. Do you know him?

A. Yes, sir, I sure do.

Q. Who is he?

(Testimony of Bernard R. Snyder.)

A. He was the dispatcher at the time, which it says right on here, at the time dispatcher.

Q. And I see the name of "Philip E. Joyal, Lt. Col., USAF"?

A. That is the gentleman that Airman Phelps hauled to the International Airport, and this is where he released him. He has to put his release on here, that he arrived at his destination okay.

Q. And that Lt. Col. Philip E. Joyal was the man, the officer at George Air Force Base that Phelps was to transport?

A. Yes, sir. There was a little disturbance that the Colonel wrote on here, while he was on the road. I see there is a little notation on this Form DD 110 that Colonel Joyal made in reference to the engine knocking, and the driver [104] checked oil O.K.

Q. On the back of this form, Mr. Snyder——

A. Yes, sir.

Q. ——there are two times filled in, one after the other. Could you explain that to me, please?

A. All right. Here is the destination (indicating), and from here he departs, which is the Base Motor Pool. They use "BMP."

Q. That is the place where you gave him this ticket? A. Yes, sir.

Q. And the time indicated there is 1455, which would be what?

A. Approximately 3:00 o'clock, lacking five minutes of it, and this is the arrival here.

(Testimony of Bernard R. Snyder.)

This is the out mileage, and it should be the same as it reads on the front. He went to Building 455 to pick up Colonel Joyal, where he was designated to go. That was the Officers Billet, and he arrived there at 1500 hours, and departed at 1505.

Q. Which was about the same time, 3:00 o'clock?

A. Yes, sir.

Q. And who writes this?

A. This is the driver's.

Q. In other words, the driver indicates he picked up Colonel Joyal at approximately 3:00 o'clock?

A. And he departed at 1505, which should be 3:05.

Q. And, I take it, he should put down the arrival time, when he arrived at Los Angeles?

A. At the airport, and then back to the Base Motor Pool, and his arrival there.

Mr. Calabro: I think we can also stipulate he never got back, can't we?

Mr. Mullender: Yes. I also want to show here that he made no entry, that is, the driver made no entry on the form after he left the Base. I just want to point that out for the record.

I have no further questions.

The Court: All right. It may so show.

Mr. Calabro: I have just one or two matters.

Recross Examination

Q. (By Mr. Calabro): This trip ticket seems to indicate that they seemed to have some trouble

(Testimony of Bernard R. Snyder.)

with the car, and had the tires and some other items checked.

A. What are you referring to here?

Q. I am looking at the row of "X's" under the "O.K."

A. This is your duty before operation. You just do this before you start your vehicle up.

The Court: Then that occurred before the trip?

The Witness: No, sir, this occurred while on the trip, when the Colonel made this notation.

Mr. Calabro: Apparently they were having some trouble with the car during operations, that there were some unusual noises and some disturbance.

The Witness: That's right.

Mr. Calabro: Nothing further.

Mr. Mullender: In light of the last question, may I ask the witness some questions about the condition of the car?

The Court: All right.

Redirect Examination

Q. (By Mr. Mullender): Mr. Snyder, do you know whether or not that car was in good working order when it left?

A. Sir, it had a new engine installed in it approximately two days prior to the departure to Los Angeles, so with a new engine there, and everything, there could have been some mechanical failure in it.

(Testimony of Bernard R. Snyder.)

Q. But the car had been thoroughly gone over prior to this trip? A. Yes, sir.

Mr. Mullender: I have no further questions.

The Court: All right. Let me see that document.

(The document was handed to the court.)

Mr. Mullender: I would like to offer the document in evidence.

The Court: It may be received.

The Clerk: Defendants' A in evidence.

(Thereupon the document heretofore marked Defendants' Exhibit A, for identification, was received in evidence.)

VEHICLE EQUIPMENT OPERATIONAL RECORD

	TYPE	REG. NO.	ADM. NO.
4 February 1954	S C	172892	3

MATCHING ORGANIZATION	DAILY	DURING OPER.	AFTER OPER.	ACTION	TIME	MILES	TOTAL (Fuel gal.)	TOTAL (Oil qts.)
M P								
OPERATOR				IN			REPORT TO	
helps A/2C				OUT	1500	48527	Los Angeles	
MATCHER				TOTAL			RELEASED BY (Signature only)[1]	
artch A/2C							/s/ Philip E Joyal, Lt Col USAF	
OPERATOR				IN			REPORT TO	
				OUT				
MATCHER				TOTAL			RELEASED BY (Signature only)[1]	
OPERATOR				IN			REPORT TO	
				OUT				
MATCHER				TOTAL			RELEASED BY (Signature only)[1]	
OPERATOR				IN			REPORT TO	
				OUT				
MATCHER				TOTAL			RELEASED BY (Signature only)[1]	

NOTE.—Items checked by driver certify appropriate maintenance service has been performed.

Signature is a certificate that vehicle was dispatched and used for official Government business only.

PREVENTIVE MAINTENANCE SERVICES

REG. NO. | TYPE | ADM. NO.

DAILY BEFORE OPERATION	O.K.	ADJUST	REPAIR	2. DURING OPERATION	O.K.	ADJUST	REPAIR
FUEL, OIL, WATER	X			CHECK INSTRUMENTS			
TIRES	X			UNUSUAL NOISES			
LEAK AND DAMAGE	X			Los Angeles			
SAFETY DEVICES	X			OFF POST			
STD FORM 91 ACCIDENT REPORT	X						
DD FORM 518 ACCIDENT IDENTIFICATION CARD	X			/s/ Partch 2/2C			
				AUTH BY			
gine was knocking, Driver checked oil O K				/s/ P.E.Joyal, Lt Col			
HAVE NOTED ALL ENTRIES ON THIS FORM AND HAVE KEN THE NECESSARY ACTION INCLUDING ARRANGEMENTS OR CORRECTION OF DEFICIENCIES NOTED BY OPERATORS.				DISPATCHER'S SIGNATURE AND GRADE			

FORM 1 FEB 53 110 (TEST) REPLACES EDITION OF 1 DEC 49, WHICH MAY BE USED. 16—68416-1

DESTINATION	TIME ARRIVAL	TIME DEPARTURE	ARRIVAL MILEAGE	LOAD	OPERATOR INITIALS
FROM B MP		1455	48527	0	EAP
TO 455 Bldg	1500	1505	48528	2 Pass	EAP
TO Los Angeles					
TO					
TO					
TO					
TO					
TO					
TO	" A CERTIFIED TRUE COPY "				
TO					
TO	Charles J. Boughton				
TO	CHALES J. BOUGHTON				
TO	2nd Lt USAF				
TO	Asst Adjutant				
TO	479th Motor Vehicle Squadron				
TO					
TO					
TO					
TO					
TO					
TO					
TO					
TO					
TO					
TO					

NOTE.—Driver will initial line corresponding with each trip. GPO 16—68416-1

PREVENTIVE MAINTENANCE SERVICES

REG. NO. | TYPE | ADM. NO.

3. AFTER OPERATION	O.K.	ADJUST	REPAIR	4 WEEKLY SERVICES	O.K.	ADJUST	REPAIR
VISUAL INSPECTION				TIRES, GAGE			
FILLERS (Clean)				BATTERY, WATER LEVEL			
DRAIN AIR TANKS				VISUAL INSPECTION			
				ANTIFREEZE			
				CLEAN EQUIPMENT			

I CERTIFY THAT MAINTENANCE SERVICES HAVE BEEN COMPLETED AS CHECKED

DATE: 4 February 1954 | GRADE: A/2C | OPERATOR'S SIGNATURE: /s/ Phelps

56

(Testimony of Bernard R. Snyder.)

Mr. Wheeler: The defendant Phelps would like to ask Sergeant Snyder two short questions.

The Court: Go ahead.

Q. (By Mr. Wheeler): Mr. Snyder, you are Phelps' immediate superior in the chain of command; is that correct? A. I was at the time.

Q. You were at thetime of all this difficulty?

A. Yes, sir.

Q. What time was Phelps available for duty on the morning of February 4th, the day preceding the accident?

A. What time was he available for duty that morning?

Q. Yes.

A. Well, roll call was at 0730 hours in the morning. Right offhand I could not tell you for sure if he was there or not, because I don't have my roll call sheet, but I believe he was.

Q. I realize the military draws a distinction, that [108] all men are on duty status when they are on the base, but was it customary for the men in the pool to report at 7:30 a.m. and be available for whatever military duties would be required?

A. Yes, sir.

Q. What time is reveille at George Air Force Base? A. At 600 hours, sir.

Q. Directing your attention to the date February 3rd, the day preceding the date that this departure took place that we are all concerned with, are you aware of any unusually long performance of duty by Airman Second Phelps?

(Testimony of Bernard R. Snyder.)

A. I can't make a statement on it, sir, because I don't know.

Q. I am just asking you if, from your recollection, you recall that he was on duty in excess of ten hours?

A. It is possible, sir, because we was running pretty heavy on runs there, and rather short of personnel at the time.

Mr. Wheeler: That is all.

The Court: There are some notations here on the back, and I gather that they indicate something, so I wish you would explain them to me. On the back here are these notations, "Destination, Arrival, Departure," and so forth.

The Witness: All right. He had departed from the Base Motor Pool. That is the Base Motor Pool he left from, and he left at 1455 hours. This is the out mileage when he left the pool, and his load was none. These are the operator's initials, and he went to Building 455, which is the Officers Billet, where Colonel Joyal was at. He arrived at 1500 hours and departed at 1505, which is 3:05. His arrival mileage was 48,528. In other words, he went one mile from the Motor Pool to Building 455, and proceeded on to Los Angeles.

The Court: And after that he made no entries?

The Witness: No entries.

The Court: Go ahead.

Mr. Calabro: No further questions on the part of the plaintiffs.

The Court: All right, step down. * * * * *

DAVID D. PARTCH

called as a witness on behalf of the defendant United States of America, having been first duly sworn, was examined and testified as follows:

The Clerk: Your full name, sir? [110]

The Witness: David D. Partch, P-a-r-t-c-h.

Direct Examination

Q. (By Mr. Mullender): Mr. Partch, what is your business or occupation?

A. U. S. Air Force, sir.

Q. And where are you stationed?

A. George Air Force Base, California.

Q. How long have you been stationed there?

A. 23 months.

Q. What are your duties at George Air Force Base? A. Vehicle dispatcher.

Q. How long have you been so employed?

A. 21 months.

Q. Calling your attention to February 4, 1954, do you recall dispatching a vehicle for transporting a Lt. Col. Philip E. Joyal?

A. Yes, sir, I do.

Q. Can you tell me just what occurred prior to that dispatch?

A. Well, I got a request from Sgt. Snyder, who was my UIC at the time, requesting or saying that a staff car was to first pick up Lt. Col. Joyal at the BOQ, and then proceed to Los Angeles.

Q. And what did you do? [111]

A. I made out a trip ticket, putting in Phelps'

(Testimony of David D. Partch.)

name as the driver, and my own as the dispatcher, and where he was supposed to go to.

Q. Mr. Partch, I show you Government's Exhibit A in evidence, and I ask you if that is a true copy of the trip ticket you have just referred to?

A. Yes, sir, it is.

Q. Do you recall at what time—independent of this, do you recall, from your own knowledge, at what time you dispatched this car to Phelps?

A. It was between 1500 and 1530.

Q. Which would be between?

A. 3:00 and 3:30 in the afternoon, p.m.

Q. Would that be what you have indicated on your trip ticket? A. Yes, sir.

Q. And did you give any orders to Phelps when you dispatched the car to him?

A. Not other than just taking the staff car and picking up Lt. Col. Joyal and taking him to Los Angeles.

Mr. Mullender: I don't think I have any other questions.

The Court: Any questions?

Mr. Calabro: No questions.

The Court: Any questions?

Mr. Wheeler: Yes, please, your Honor. [112]

Cross Examination

Q. (By Mr. Wheeler): Sergeant, what was your rank at the time that this incident occurred?

A. Airman Second Class, sir.

(Testimony of David D. Partch.)

Q. So that you were on a level then with Airman Phelps at the time? A. Yes, sir.

Q. That is, he and you were both of the same rank? A. Yes, sir.

Q. And as far as you know, you gave him—as far as you recall, I should say, you gave him no orders in connection with what time he was supposed to get back, or how he was supposed to get back? A. No, sir.

Q. Do you have any knowledge—you are a sergeant now are you not?

A. No, sir, Airman First Class.

Q. Airman First Class. I am sorry. Do you have any knowledge now as to what duties Airman Phelps performed on February 3, 1954?

A. Well, that's kind of hard to say, because at the time we were real short of drivers in the Motor Pool, and we was using everybody as much as we could, and some more than we should. [113]

Q. By that do you mean that they were working long hours? A. Yes, sir.

Q. Do you know whether or not Sgt. Phelps had any driving duty on the morning of February 4th?

A. That I couldn't say, sir. I wouldn't say for sure. It is more than likely he did, but I wouldn't say for sure.

Mr. Wheeler: Nothing further.

Mr. Mullender: No questions.

The Court: All right, sir, you may be excused.

* * * * *

CLARENCE C. SMITH

called as a witness on behalf of the defendant United States of America, having been first duly sworn, was examined and testified as follows:

The Clerk: Your full name, sir?

The Witness: Smith, Clarence C.

Direct Examination

Q. (By Mr. Mullender): Mr. Smith, what is your business or occupation? [114]

A. Credit manager at the Biltmore Hotel, Los Angeles, California.

Q. And how long have you been so employed?

A. Since October, 1938.

Q. What are your duties as credit manager at the Biltmore Hotel?

A. Full charge of credit and relations with respect to guest records, registrations, and all records pertaining to the front office.

Q. As such, do you have custody of the records relating to the registration and time of arrival and departure of guests in the hotel? A. Yes.

Q. Do you have in your custody and possession any records and registration relating to Lt. Col. Philip E. Joyal of the United States Army Air Force?

A. I have a registration for the year date of 1954, dated——

Q. Excuse me. Have you brought those records with you? A. Yes, sir.

Q. Will you describe them to me, please?

A. I have a record of a registration for the year

(Testimony of Clarence C. Smith.)

of 1954, dated time-clocked February 4th, 6:05 p.m., 1954, signed "Philip E. Joyal, Lt. Col., 8149-A, Headquarters Air [115] Force Defense Command, 1609 West Cheyenne Road, Colorado Springs, Colorado."

Q. What does that record indicate?

A. That indicates the Colonel—or it indicates a registration under the——

Q. Under the name of Lt. Col. Philip E. Joyal?

A. Yes. Assigned to Room 10340, with a rate of $5.00, a military rate, so marked.

The Court: You want to be sure the rest of us don't get it; is that it?

The Witness: Right.

The Court: All right.

The Witness: Made by Room Clerk 16 of our regular staff, with a notation of checkout date of February 5th.

Q. (By Mr. Mullender): I see. Does this printed notation in the upper left hand corner indicate the time that the person registered under that name?

A. Yes, that is the regular proceeding of the registration and the time-clocking at that time.

Q. I see. When the guest signs this card, it is then put under the time-clock and the time is recorded there? A. After he has signed.

Q. After he has signed? A. Yes, sir.

Q. Do you have any other records you brought with you [116] pertaining to this?

A. The record of the room folio of the Biltmore Hotel of Lt. Col. Philip E. Joyal, assigned to Room

(Testimony of Clarence C. Smith.)

10340, at the rate of $5.00, at 2-4-54, Headquarters Air Force Defense Command, 1609 West Cheyenne Road, Colorado Springs, the same time, 6:05 p.m.

Q. Excuse me, sir. Would this record be made from that other record that you have just shown me?

A. Yes, this is the record made from the registration.

Q. Does that record indicate the time the man checked out of the hotel? A. Yes, sir.

Q. Where is that indicated on there?

A. This records the room charge under date of February 4th of $5.00, and under date of February 5th, showing the account was paid, stamped by the cashier "Paid," cashier No. 14, and so time-clocked February 5th at 6:16 a.m., 1954, which coincides with the time-clocking of the registration, which was with the account at the same time.

Q. I see. Would these records indicate to you that a person registered in the Biltmore Hotel on February 4, 1954, at 6:05 p.m., and checked out on February 5, 1954, at 6:16 a.m.?

A. That is our usual procedure on these documents.

Mr. Mullender: Thank you very much, sir. No other questions. [117]

Mr. Calabro: No questions for the plaintiffs.

The Court: All right. We will let you keep your records this time.

The Witness: Thank you.

(Testimony of Clarence C. Smith.)

The Court: All right. By the way, the record shows he was alone in the room?

The Witness: He registered singly, yes, sir.

The Court: Singly. All right.

(Witness excused.)

Mr. Mullender: Your Honor, for the next witness I would like to call the defendant Eugene A. Phelps.

Mr. Phelps, will you take the stand, please?

The Court: All right. Are you calling him under 43(b), as an adverse witness, or what?

Mr. Mullender: I believe he will be adverse, yes, your Honor.

The Court: You had better announce what you are doing. I am not running the case for you, but if you are calling him as an adverse witness, you had better announce it as such, and then you can ask him leading questions, under 43(b).

Mr. Mullender: Well, your Honor, if the witness turns out to be adverse——

The Court: Oh, no, no. That isn't the point.

Mr. Mullender: Well, he is not adverse to us on the pleadings, your Honor. He is not opposed to us. [118]

The Court: Then you are calling him as your witness. That is the point. There is one way to call him, and then impeach him if he proves to be an adverse witness, but this is not an adverse witness. He is an adverse party if he is taking a position contrary to yours, and then you may be able to examine him that way. He is not a hostile witness.

Mr. Mullender: Of course, your Honor, I would rather call him as an adverse witness, but I don't believe under the state of the pleadings I would be entitled to, so I think therefore I will call him——

The Court: All right, you call him. Go ahead.

EUGENE A. PHELPS

one of the defendants herein, called as a witness on behalf of the defendant United States of America, having been first duly sworn, was examined and testified as follows:

The Clerk: Your full name, sir?

The Witness: Eugene A. Phelps.

Direct Examination

Q. (By Mr. Mullender): Mr. Phelps, what is your business or occupation?

A. I am employed in the United States Air Force right now, sir.

Q. What are your duties? [119]

A. I work in the tire shop at the Base now.

Q. What were your duties on or about February 4, 1954?

A. Well, I was a driver in the staff car section. I was supposed to be what they call——

The Court: Speak a little louder, please.

The Witness: I was in charge of the staff car section at that time.

Q. (By Mr. Mullender): Was that at George Air Force Base? A. Yes, sir.

Q. Do you recall that on February 4, 1954, you were assigned to drive an officer to Los Angeles?

(Testimony of Eugene A. Phelps.)

A. Yes, sir.

Q. Will you tell me how the situation arose?

A. Well, sir, it was about five minutes to 3:00, and I was over to the office, and Sgt. Snyder got a request to take this officer to Los Angeles, so I had to go change my clothes, get ready, take a staff car, pick up the officer, and take the officer to Los Angeles.

Q. Do you recall the name of that officer?

A. Yes, sir, Lt. Col. Joyal.

Q. And was a trip ticket made out and given to you for this trip? A. Yes, it was.

Q. Mr. Phelps, I show you Defendants' Exhibit A in [120] evidence, and ask you if that is a true copy of the trip ticket that was given to you at that time? A. Yes, sir, it was.

Q. That indicates that you were checked out with this car at approximately 1500 hours, which would be about 3:00 o'clock? A. Yes, sir.

Q. And the officer you were to transport would be the man whose name appears here, Philip E. Joyal, Lt. Col.? A. Yes, sir.

Q. After you received this trip ticket, Mr. Phelps, what did you then do?

A. Well, I proceeded on up to the officers' bachelor quarters there and picked up the colonel. I had to wait for him for about fifteen minutes, so I got ready, carried his bag up to the car, and we checked out of the Base at approximately 3:30, or somewhere around there, or a quarter to 4:00.

(Testimony of Eugene A. Phelps.)

Q. So then you and Lt. Col. Philip E. Joyal left the Base in this car at about 3:30?

A. Yes, sir.

Q. What orders were given to you when the car was dispatched to you?

A. The orders I was given was that I was supposed to take him to L.A. International, but we got on the road, [121] and we were about seven miles from the Base, and he told me then that he wanted me to take him to the Biltmore Hotel instead.

Q. Were you given any orders as to what you should do after you left the Colonel at the International Airport?

A. They don't tell you anything. You are told once to take the officer to the destination, and you make a quick trip back to the Base.

Q. Then it was your understanding that after you left the colonel off at his destination, you should return immediately to George Air Force Base? A. Yes, sir.

Q. You say the colonel told you to take him to the Biltmore instead; is that correct?

A. Yes, sir.

Q. And did you take that as a change in your orders? A. Yes, sir.

Q. And then what did you do?

A. I proceeded on to take him to the Hotel Biltmore.

Q. About what time was it you arrived at the Biltmore? A. Approximately 1800 hours.

Q. What time would that be?

(Testimony of Eugene A. Phelps.)

A. 6:00 o'clock.

Q. What did you do after that?

A. Well, I gassed up, and checked the oil, and started [122] back.

Q. Where was it that you did that?

A. Some gas station here in Los Angeles. It was a Chevron Gas Station, about a block and a half or better from the Biltmore Hotel.

Q. It was right downtown? A. Yes, sir.

The Court: What time was it, according to your recollection, that you arrived at the Biltmore Hotel?

The Witness: About 6:00 o'clock, sir.

The Court: What?

The Witness: About 6:00 o'clock, I figure.

Q. (By Mr. Mullender): That was on February 4th? A. Yes, sir.

Q. Now, after you gassed up, what did you do?

A. I started back for Victorville, and I stopped and got something to eat.

Q. Where was that?

A. Just outside of Pasadena.

Q. What time was that?

A. Oh, about 8:00 o'clock. No, about 7:30, about 7:30 it was.

The Court: We are still talking about the same day, the 4th?

The Witness: Yes, sir. [123]

Q. (By Mr. Mullender): Where did you go after that?

Mr. Wheeler: Your Honor,——

(Testimony of Eugene A. Phelps.)

The Court: Yes.

Mr. Wheeler: ——on behalf of the witness, I would like to claim the privilege under the Fifth Amendment, the privilege against self-incrimination, and, if the court please, I think the proof is far enough along that we can make a little short intelligent statement on this, if we may, to the court at this time. It is a question as to the witness' privilege.

The Court: I don't see where there is any question of self-incrimination. We are entitled to have an explanation of how he happened to be on the Barstow road. I am not interested in anything else. So far as that inquiry is concerned, I cannot see any tendency to incriminate him.

Mr. Wheeler: Well, may I make a short statement, your Honor?

The Court: Yes.

Mr. Wheeler: We know that this man was assigned by the military to proceed to the Los Angeles Airport, and that his orders were altered by the officer in the car, and that he arrived here at about 6:00 o'clock that evening. This man is then still subject to military law, although he is not on a military reservation or post at the time, but he is under severe penalties under military law, under the Uniform Code of Military Justice. [124]

The Court: I happen to know something about the Code. I wrote the first opinion under it.

Mr. Wheeler: I am aware of that, your Honor, and I have read your opinion on it.

(Testimony of Eugene A. Phelps.)

The Court: All right. I can't see what problem can arise here.

Mr. Wheeler: Well, the minute that this man on the stand makes a statement under oath that he has failed to carry out his orders, or the routine to proceed as quickly as is lawfully allowed to return to Victorville, it is possible to commence to draw charges and specifications according to the Code.

The Court: Well, you see, that is why you would have been in a better position if he were not a defendant, or if you had not appeared, except appeared possibly by default, and he would have admitted that, so far as he was concerned, he was negligent. But you have come in here and have made certain assertions denying the allegations in the complaint.

I am quite aware of the nature of the Fifth Amendment, and I have written quite a number of opinions on it, and articles relating to it, but when you come in and make a defense to an action, then when you are put on the stand, you cannot say, "I am not going to answer that for fear of incrimination."

I cannot see at the present time how there is any [125] tendency to incriminate him. It is already apparent that he was out of the way, because the road to this Post does not go by way of Barstow.

We have a record showing that he dropped his fare at the Biltmore here at 6:05 p.m.

Mr. Wheeler: Yes, sir.

(Testimony of Eugene A. Phelps.)

The Court: Now, I am not very much concerned with whether it was changed. As a matter of fact, possibly the officer may have found out that there are buses that take you from the Biltmore to the International Airport, and he may have decided rather than take a chance on it, to stay overnight and take a bus from there to the Airport, rather than to keep the soldier there until he got transportation. I don't know, and the record does not show what transportation the officer had after he reached here.

Now, we have a statement that this witness went back, and that he ate at 7:00 o'clock.

Mr. Wheeler: Yes, sir.

The Court: Now, it is very important from the standpoint of the Government whether this occurred while he was in the course of duty.

Mr. Wheeler: Yes, sir.

The Court: Under the law of California, and the general law,—of course, a little deviation on a return trip both in time and space does not matter, but if a man who had [126] dropped his charge at 6:05 p.m. is found in Barstow far away at 5:00 o'clock the next morning, and in an accident, the question arises whether he was at that time on his return trip on the duty he was supposed to be performing.

There is a famous case referred to in the Restatements, where an employer sent a man to go and sell goods in Albany, and he wound up in Schenectady, and it was decided that he was told to go

(Testimony of Eugene A. Phelps.)

to Albany, and not to Schenectady. There are California cases, and there is a case in the Supreme Court of California where a driver was told to go to a certain place to pick somebody up and then go back to the office, and instead of that he picked up a woman, gave her a ride far out of the way, and then went back to his office, and the court held that was outside of the scope of his employment.

Now, the case is governed by State law, so it is very important from the standpoint of the Government that we find out how he came to be in Barstow.

Mr. Wheeler: But, your Honor, I would like to submit that the military might be very much influenced in how this man could be in an accident at 5:00 a.m. in the morning 20 miles beyond his duty station.

The Court: That is not the point. We are not concerned with that here. The Government has the right to prove its case. The Government is not liable unless he was in the course of employment, and he is the only person who can explain [127] how he happened to be 25 miles away ten hours after, according to his own statement, he left Pasadena. Or, that is more than ten hours.

Mr. Wheeler: I would like to suggest to the court——

The Court: That is nine hours, I think.

Mr. Wheeler: ——that there are other witnesses here available in the courtroom, if the Govern-

(Testimony of Eugene A. Phelps.)

ment desires, that will not place this man under this tremendous hazard.

The Court: I don't see that there is any hazard, or that he is admitting anything. It is already shown in the record that he was found unconscious in an accident at 5:00 o'clock in the morning. That is from 7:00 to 12:00—that is nearly ten hours after he had presumably started back to camp, and the location shows that Barstow is not on his route.

Mr. Wheeler: Yes, but wouldn't the circumstances reasonably make a difference in the distance?

The Court: That is not the point. I am a trier of the facts, and I have to determine whether he was in the course of his employment at the time. The mere fact that he was found there,—supposing the facts show that he had some engine trouble, and that he went to Barstow in order to repair the engine, and did not call up. There are all sorts of things that might arise. How am I, as a trier of the facts, to determine liability? There is a suit here for $25,000 personal damages, and we have already accumulated, if I can add it up [128] correctly, over $3,000 in special damages to the car, and $168.00 for medical bills. Then general damages are prayed for.

I want to protect this man, but I cannot, for two reasons. In the first place, he has appeared in this case, and he has filed an answer denying the allegations. As a matter of fact, he could be called as an

(Testimony of Eugene A. Phelps.)

adverse party, because if the Government denies he was in the course of his employment, then they are not joint tortfeasors, and then he is just as adverse as anybody can be to the Government. But I cannot see that his explanation—I am not interested in whether he had anything to drink or not. That has nothing to do with it, because if an employer sends out an employee on a straight line, and he gets drunk, if he is in the course of duty, it is the employer's bad luck. The law says you, having made it possible by putting on a man who is likely to get drunk, ought to take the responsibility.

That is not the point here. The point here is that he was apparently not on his road back. He was long overdue by the longest route. What was he doing in Barstow at that time of the morning? He had left the colonel at the Biltmore at 6:05 p.m., and he himself had started back through Pasadena, and stopped to eat there.

I am sympathetic with him. I do not want to make any record here that will stare him in the face before a board, [129] but he has appeared, and he is the only man who can tell us.

How am I going to tell that there was nothing wrong with the car? There is a notation there that there was something wrong with the car, but evidently he fixed it before he left. He is the only one who can explain to us how he happened to be where he was at that time in the morning, and the Government is entitled to that.

(Testimony of Eugene A. Phelps.)

Mr. Calabro: May I have just a second, your Honor, to talk to counsel?

Mr. Wheeler: There has been a suggestion made, your Honor,—I realize fully the Government's dilemma, and also the dilemma the man faces of possible dishonorable discharge and a considerable period of time in excess of the amount of the damages, if the man's wages are worth anything, not to count his loss of freedom under certain sets of facts. Would the court consider testimony from this man as to what transpired from the time after he left San Bernardino and headed on Route 66 on through to Barstow?

The Court: The main point is this: You see, I have to determine whether the matter is of a type that will incriminate him.

Mr. Wheeler: Yes, sir.

The Court: I cannot see at the present time that that is of a character that it would incriminate him.

Mr. Wheeler: Well, if this man—— [130]

The Court: Will you get me my opinion in Shibley vs. United States.

Mr. Wheeler: Here is what I would like to suggest to the court, your Honor,——

The Court: Then there is no showing here—now, of course, the plaintiff is interested, but I don't think it is very proper for you to be on the other side, or for you to be there.

Mr. Calabro: I am awfully sorry, your Honor.

The Court: I don't want you to advise your op-

(Testimony of Eugene A. Phelps.)

ponent, because he is supposed to be your opponent. Otherwise, I will think that you were not acting in good faith when you made this soldier a defendant. I know you want to stick the Government, but it is up to me to determine whether the Government is liable. Let his own lawyer argue this matter. You are not supposed to be advising your adversary.

Mr. Calabro: I am sorry, your Honor. I am sure that there was nothing improper in the conference that I had with opposing counsel. I am trying to facilitate——

The Court: If you are so sympathetic to the soldier, dismiss as to the soldier. If you want to save the soldier embarrassment, dismiss as to him, and base your case upon the Government. It is too late for the Government to ask that he be brought in, and it would not make any difference anyway, in view of the recent decisions. Let me see,—what is the date? You can dismiss against him if you are so [131] sympathetic to his cause,——

Mr. Calabro: I am sorry, your Honor.

The Court: ——and stake your case on your main showing against the Government.

Mr. Calabro: Well, dismissing, your Honor, as against the individual defendant is not going to change the issues in this case, and it is not going to change the facts which are going to come before the court.

The Court: Well, I could say that, if he is no

(Testimony of Eugene A. Phelps.)

longer a defendant, I might be more inclined,—I do not say that I will——

Mr. Calabro: I understand.

The Court: ——but I might be more inclined to sustain an objection to this inquiry lest it might incriminate him. At any rate, let counsel work it out.

Mr. Wheeler: Yes, sir.

The Court: I can't see that this would have a tendency to incriminate him.

Mr. Wheeler: I suggest to your Honor that there will be evidence that is available if this man is questioned under oath that he was drinking in the town of San Bernardino.

The Court: I don't think that is material to the case.

Mr. Wheeler: But if he does not claim his self-incrimination privilege, you have a statement under oath which any competent member of the Judge Advocate General's force is [132] dutybound to prosecute this man for.

The Court: I don't think at the present time there is any question before the court that is of a character so that the court can say it would incriminate him at all.

Mr. Wheeler: Yes, sir. For the purposes of the record, would you direct the witness to answer so that the record will show that he has not waived his privilege, in case there is a subsequent court-martial, and so that the man later is not faced with a waiver?

(Testimony of Eugene A. Phelps.)

The Court: You have made your objection, and I am going to direct the witness to answer upon the ground that the nature of the inquiry is such that the answer is not of a type that it might incriminate him,—any answer he might make. All right.

Q. (By Mr. Mullender): Mr. Phelps, you said you had dinner about 7:00 o'clock. That was where?

A. Just outside of Pasadena.

Q. Just outside of Pasadena. Now, what did you do after that?

A. Well, I drove on in to San Bernardino, and went out to one little tavern out there and had a couple of beers.

Q. What time was that that you arrived in San Bernardino?

A. I am not positive of the time.

Q. Approximately? [133]

A. Oh, probably 8:00 or 8:30, a quarter to 9:00, somewhere in there.

Q. Some time between 8:00 and 9:00 o'clock when you arrived in San Bernardino?

A. Yes, sir.

Q. And you say you went to a tavern?

A. Yes, sir.

Q. And what was the name of that place?

A. The Silver Saddle.

Q. The Silver Saddle. And that was in San Bernardino? A. Yes, sir.

Q. What did you do at the Silver Saddle?

A. Drank a couple of beers.

(Testimony of Eugene A. Phelps.)

Q. Do you recall exactly how many beers you drank? A. No, I don't.

Q. How long were you at the Silver Saddle?

Mr. Calabro: I am going to object, your Honor. The court has indicated that this type of matter is not admissible.

The Court: I want to get the lapse of time, when he left, and how he got to Barstow. That is what I am interested in more than anything else.

Q. (By Mr. Mullender): Do you know how many beers you had at the Silver Saddle?

Mr. Calabro: I am going to object again on the ground it is wholly irrelevant and immaterial if this man saw fit [134] to have a beer——

The Court: It does not lie in your mouth to object. Please don't consider yourself to be his attorney. He has an attorney. You stick to being the attorney for the plaintiffs, please. You have no right to object to any questions asked of a man who is not your client.

All right, go ahead.

The Witness: I don't recall how many I had.

The Court: All right. Let me take over. What did you do after that?

The Witness: Well, I left the Silver Saddle and started back to Victorville and I was pretty tired, so I picked up a guy that was in uniform, and asked him if he would drive into Victorville for me, and wake me up when we got to the share-your-ride station in Victorville, and I would drive on out to the Base, and instead the party drove on all

(Testimony of Eugene A. Phelps.)

the way into Barstow, and he woke me up, and I started back, and I had the accident.

The Court: He drove you to Barstow?

The Witness: Yes, sir.

The Court: Did you sleep in the car at Barstow?

The Witness: No, sir; not that I remember.

The Court: Well, when did he get out?

The Witness: Oh, approximately a quarter to 5:00.

The Court: In the morning? [135]

The Witness: Yes, sir.

The Court: And then you yourself started back to Barstow?

The Witness: Back to Victorville.

The Court: Back to Victorville at that time?

The Witness: Yes, sir.

Q. (By Mr. Mullender): What time was it when you left the Silver Saddle and started towards Barstow?

A. Oh, it must have been midnight.

Q. Are you sure of the time?

A. No, sir, I am not.

Q. What time does the Silver Saddle close?

A. 2:00 o'clock.

Q. Did you leave before it closed?

A. Yes, sir.

Q. And what time did you arrive in Barstow?

Mr. Calabro: I am going to object to that, your Honor, on the ground it calls for the conclusion of the witness.

(Testimony of Eugene A. Phelps.)

The Court: Oh, it is very important. Overruled.

Mr. Calabro: For the record, your Honor, I would like to complete my objection. The witness has heretofore testified that when he arrived at Barstow he was asleep, so any estimate which he might make of the time that he arrived in Barstow would be wholly speculative. He would have no knowledge to base it on.

The Court: That goes to weight, not to admissibility. [136] Overruled. You may answer.

The Witness: Will you repeat the question?

(The question was read.)

The Witness: I could not be positive of the time from the time I started back. It could have been right around 4:30 or a quarter to 5:00.

Q. (By Mr. Mullender): Is that the time you woke up in Barstow?

A. I didn't pay no attention to the watch, or anything. He just got out and told me, "Thanks a lot." And I said, "Well this sort of fixes me up fine." And then I started back, and I had the accident.

Q. Where did you pick up this hitchhiker?

A. Down here at the junction, or down there in San Bernardino. It is right there,—I think there is an island there, and it is right there on the corner of 395 and 66 junction, right there.

Q. How long was that after you left the Silver Saddle Cafe at about 12:00 o'clock?

A. Oh, it couldn't have been—it couldn't have

(Testimony of Eugene A. Phelps.)

taken over ten or fifteen minutes to drive across town to get there.

Q. So it must have been around 12:30, then?

A. Somewheres around there. I am not positive.

Q. Then from that time, approximately 12:30, until [137] the time you woke up in Barstow, was a little longer than four hours; is that correct?

A. Yes, sir.

Q. Do you know the distance in miles between that point where you picked up the hitchhiker and Barstow? A. Yes, sir, I do.

Q. How many miles is that?

A. It is about 66 miles, or a little better. Oh, it is better than that. It must be around 70.

Q. And it took you four hours to travel that distance; is that correct? A. That's right.

Q. Can you describe this hitchhiker?

A. Well, he about about five-ten and one-half, I couldn't see his hair because it was dark. That is just about all I can tell you about him. He was just a common ordinary G.I.

Q. Was he a civilian or in uniform?

A. He was in uniform.

Q. What branch of the service was he in?

A. If I remember correctly, I think he was in the Marines. Either the Marines or the Army. I am not positive.

Q. Do you know whether or not there is a military base in Barstow?

A. Yes, sir, I know that there is. [138]

Q. Had he told you where he was going?

(Testimony of Eugene A. Phelps.)

A. No, sir, he didn't.

The Court: Did you tell him where you were going?

The Witness: I told him where I was going, sir, yes.

The Court: You had made the trip from the Base to Los Angeles Airport before?

The Witness: Yes, sir, I had.

The Court: And Barstow is not on the road, is it?

The Witness: No, sir, it isn't.

The Court: It is out of the way all together, is it not?

The Witness: Yes, sir.

The Court: And to go by way of Barstow would be how many miles out of your way,—if you went to the Base by way of Barstow?

The Witness: I couldn't tell you, sir. I know it would be far enough out of the way, but I wouldn't know the mileage.

The Court: You wouldn't know the mileage. All right.

Mr. Mullender: No further questions.

The Court: And questions?

Mr. Wheeler: Yes, your Honor.

Cross Examination

Q. (By Mr. Wheeler): Airman Phelps, you have testified that you picked [139] up a hitchhiker on the outskirts of San Bernardino on Route 66, and that this man was wearing a military uniform,

(Testimony of Eugene A. Phelps.)

and you stated that you placed him behind the wheel; is that correct? A. Yes, sir.

Q. What did you do then?

A. I went to sleep, sir.

Q. Prior to your going to sleep, did you state anything to this man to whom you had entrusted a Government vehicle?

A. Yes, sir, I told him that the engine was bad, that it wasn't holding any oil pressure, and not to drive it too fast, and to be sure that he woke me up in Victorville.

Q. And when was the next time you were awake?

A. When he woke me up in Barstow, sir.

Mr. Wheeler: No further questions.

The Court: All right. Any questions?

Mr. Calabro: Yes, your Honor.

Cross Examination

Q. (By Mr. Calabro): Mr. Phelps, would you please tell us what your duties were at the time that you were dispatched for this trip, as being in charge of the staff car section?

A. Well, there is about five men, and I had to make [140] sure that they kept the cars clean, and that they took the runs when they was issued out, and just took care of the section, plus driving myself.

Q. Were you the only driver in this staff car section?

(Testimony of Eugene A. Phelps.)

A. No, sir, I wasn't. There was approximately five or more, or maybe less at that time.

Q. Other drivers besides yourself?

A. Yes, sir.

Q. And were these other drivers under your command?

A. You can say in a way that they were. In a way they were just——

Q. You took your orders, did you, from Sgt. Snyder, who testified? A. Yes, sir.

Q. He was your superior? A. Yes, sir.

Q. Then so far as the line of command is concerned, the other drivers in the staff section were in your command, so to speak? A. Yes, sir.

Q. Did you have the authority to assign these persons to driving the automobiles also?

A. No, sir, not unless there was a request, like the one I had to take, and then I would just give them the trip tickets, and they would make their run. [141]

Q. At that time I understood you were an airman second class? A. Yes, sir.

Q. Calling your attention to the date on which you were assigned to this trip, do you recall whether or not you had worked that morning?

A. Yes, sir, I went to work at 7:30.

Q. How long did you work from 7:30?

A. I worked right up until the time to take the run, and I stayed right on working then.

Q. What did you do from 7:30 until 3:00 p.m., when you started this run?

(Testimony of Eugene A. Phelps.)

A. I drove around on the Base there. I had to take a couple of runs on the Base, and then I cleaned up the staff cars.

Q. Then is it fair to say, Mr. Phelps, that between 7:30 a.m. on February 4, 1954, until approximately 3:00 p.m. that same afternoon you worked continuously around the Base? A. Yes, sir.

Q. Either driving or cleaning cars, other than taking time off perhaps for lunch?

A. Yes, sir.

Q. And what time did you get up that morning?

A. 6:00 o'clock, sir.

Q. Do you recall what duties, if any, that you may have [142] had on the day before you were sent out on this trip, which would have been February 3rd?

A. Yes, sir. I worked until about 2:00 o'clock that night of the 3rd.

Q. Do you mean until 2:00 a.m., February 4th?

A. Yes, sir.

The Court: February 3rd that would be?

Mr. Calabro: Your Honor,——

The Court: Oh, yes, February 4th. Pardon me. That is my error.

Q. (By Mr. Calabro): So that, if I understand your testimony correctly, Mr. Phelps, you worked until—well, you worked on February 3rd all the way until 2:00 a.m. of February 4th?

A. Yes, sir.

Q. Is that right? A. Yes, sir.

Q. And were you working as a chauffeur or

(Testimony of Eugene A. Phelps.)

driving someone during that period of time in the evening?

A. Yes, sir. If I remember right, I took two captains to L.A. International.

Q. And you got back to the Base at 2:00 a.m.?

A. Yes, sir, that is, approximately 2:00 a.m.

The Court: Speak a little louder, please.

The Witness: It was approximately 2:00 a.m. I am not [143] positive of the time.

The Court: The night before?

The Witness: Yes, sir.

Q. (By Mr. Calabro): So that you went to bed at approximately 2:00 a.m. on February 4, 1954, and you got up at about 6:00 a.m. on February 4th, and you had about four hours sleep?

A. Yes, sir.

Q. So that from 6:00 a.m. you worked—after you started working at 7:30, you worked until 3:00 p.m., or at least you were working until the time that this accident happened, or until the time you went to sleep; is that right? A. Yes, sir.

Q. And you went to sleep some time around mid-right? A. Yes, sir, somewhere around there.

Q. Had you worked the full day from 7:30 a.m. on February 3rd up until 2:00 a.m. the following day? A. Yes, sir.

The Court: Your shift is a broken shift, is it not?

The Witness: No, sir. We work straight days, and if we have enough people, enough drivers, why, then you only have to work eight hours, but if you don't, you have to work overtime.

(Testimony of Eugene A. Phelps.)

The Court: At the time you were given this assignment, you were not sleepy, and you did not tell the sergeant that you had just gotten in at 2:00 o'clock the night before, and [144] you were tired and sleepy, and to pass it on to someone else, did you?

The Witness: No, sir, I didn't.

The Court: Were you sleepy? You did not feel sleepy, did you?

The Witness: No, sir, I didn't.

The Court: You did not complain to the officer that was with you that you were sleepy, or anything like that?

The Witness: No, sir.

Q. (By Mr. Calabro): When you returned from your trip to L.A. International Airport at 2:00 a.m. on February 4th, did you turn in a trip ticket to Airman Partch?

A. No, sir. He is the day dispatcher, and they had a night dispatcher at the time, and I turned the trip ticket into him at that time.

Q. There was a trip ticket turned in to the dispatcher then on duty? A. Yes, sir.

Q. And do those trip tickets remain a part of the records of the dispatcher?

A. I believe for 90 days is all, sir.

Q. And do those trip tickets come to the attention of Officer Snyder—or, I am sorry, Airman Snyder?

A. Not especially, unless there was something on there, that there was something wrong with the vehicle, or something like that. [145]

(Testimony of Eugene A. Phelps.)

Q. Were there any other drivers available for the trip to the Biltmore Hotel with Lt. Col. Joyal at the time you were sent out?

A. No, sir, I was the only driver around at that time.

Q. All the other drivers were out at the time?

A. Yes, sir.

Q. Were most of the other drivers in your staff car section working about the same length of time you were,—I mean in hours per day?

A. Yes, sir.

Q. The staff then was underhanded at the time?

A. Yes, sir.

Q. Or undermanned, I should say?

A. Yes, sir.

Q. Did you wake up at all between the time that the hitchhiker started to drive until the time that he awoke your personally after you arrived at Barstow? A. No, sir, I didn't.

Q. Did you ever give him permission to drive the car from Victorville to Barstow? A. No, sir.

Q. Was the trip from Victorville to Barstow made against your will?

A. Well, there wasn't much will when I was sleeping.

Q. Then if there were any stops—I am sorry. Strike [146] that.

Were you aware of any stops having been made between the time that you fell asleep after leaving San Bernardino until the time that you were awak-

(Testimony of Eugene A. Phelps.)

ened by the person whom you authorized to drive the car? A. No, sir.

Q. Do you know whether or not he had any trouble with the car between San Bernardino and Barstow? A. No, sir, I don't.

Q. At the time that the accident happened, then, you were on your way back to the Air Force Base, were you not? A. Yes, sir.

The Court: You say you have taken many of these trips. You said you took a couple the day before. In these trips if you ever got sleepy, there was nothing in the rules that prevented you from stopping the car at a gas station, and taking a catnap, and sleeping, was there?

The Witness: No, sir, there wasn't.

The Court: There isn't any such?

The Witness: No, sir.

The Court: And if you had arrived late on that account all you would have to do is to explain to the man that you had gotten sleepy, and that you pulled off on the side of the road until you woke up, or you went into a station and did that; isn't that true? [147]

The Witness: Yes, sir.

The Court: On the contrary, it is against all rules for anybody who drives a Government car, whether it is a recon. car, or any kind of a car, to entrust the vehicle to anyone else; isn't that true?

The Witness: Yes, sir.

The Court: Anything further?

(Testimony of Eugene A. Phelps.)

Mr. Calabro: Yes, your Honor. I am just giving your question some thought.

Q. Do you recall the happening of the accident?

A. No, sir.

Q. Did you ever see the truck involved in the collision before the accident happened?

A. No, sir.

Q. When was the first time that you were aware of the fact that an accident had occurred?

A. About 24 hours later.

The Court: The only thing that you remember about this soldier is his turning the car over to you, and you starting back?

The Witness: Yes, sir.

The Court: And then you have no recollection?

The Witness: No, sir, I don't.

The Court: That is a common experience. I have tried these cases by the hundreds in the last 28 years, and it is [148] a common occurrence for a witness, especially one which had a head injury, a serious injury, to remember nothing beyond a certain point.

Q. (By Mr. Calabro): Did you have some sort of an argument with the driver of the car when you woke up in Barstow?

A. I just told him I thought it was pretty nice of him to take me out of my way like that, and getting me into trouble. That is all I said to him, and started back then.

Mr. Calabro: No further questions.

The Court: Anything further?

(Testimony of Eugene A. Phelps.)

Mr. Wheeler: Just one short question.

The Court: All right.

Cross Examination—(Continued)

Q. (By Mr. Wheeler): How long were you hospitalized after this accident?

A. I was in the hospital 20 days, and then I was on the quarters for about two months.

The Court: Where were you injured, do you know?

The Witness: I had a fractured skull, and a broken foot, and some lacerations.

Q. (By Mr. Wheeler): Is that the scar on your forehead from the fractured skull, that you have up over your left eyebrow that runs up through your hairline? A. Yes, sir. [149]

Q. How long was that skull fracture?

A. They told me it was fractured to the eye socket, sir.

Mr. Wheeler: That is all.

The Court: All right.

Mr. Mullender: No further questions from this witness, your Honor.

The Court: All right, step down.

(Witness excused.)

Mr. Mullender: Your Honor, I have just one more witness.

The Court: All right. Let's finish with the witnesses, and then we will take a recess until morning.

Mr. Mullender: This will be very short, your Honor.

The Court: Unless there is rebuttal. I want to hear the testimony tonight, and then you can come back tomorrow and argue the case. It is late, and there is no use of crowding it all in in one day. We can finish tomorrow and discuss the issues then.

THOMAS H. HARDING

called as a witness on behalf of the defendant United States of America, having been first duly sworn, was examined and testified as follows:

The Clerk: Your full name, sir?

The Witness: Thomas H. Harding, H-a-r-d-i-n-g.

The Court: Speak a little louder, will you, so that [150] everybody can hear you.

Direct Examination

Q. (By Mr. Mullender): Mr. Harding, what is your business or occupation?

A. Mechanic, automobile mechanic, Dahlgren Texaco Service.

Q. That is your present occupation; is that correct? A. Yes, sir.

Q. Approximately a year ago, what was your occupation?

A. Heavy equipment operator for the United States Air Force.

Q. And where were you stationed?

A. At George Air Force Base.

Q. Do you recall where you were on the night of February 4, 1954?

A. Silver Saddle Cafe, San Bernardino.

Q. Were you on duty?

(Testimony of Thomas H. Harding.)

A. No, sir, off duty.

Q. Were you in uniform? A. No, sir.

Q. And between what hours were you in the Silver Saddle Cafe?

A. I am not sure, but it was around 9:00—well, from 9:00 till 1:00, I guess, approximately.

Q. Between 9:00 and 1:00. Do you know whether or not [151] there was an accident involving an Air Force car the next morning?

A. Yes, sir.

Q. How do you know that?

A. The car was gone the next morning when I went to work, and whein they got the report in I was there, that it had been involved in an accident.

Mr. Calabro: Just a moment. I am going to object.

The Court: I don't get this at all.

Mr. Calabro: Well, the question was whether or not he knows if there was an accident, and how does he know that, and he says that he knows it because the following day he reported to work and somebody told him, or a report came in that there was an accident. That is based purely on hearsay, and I move the answer be stricken.

The Court: Just a minute. What is the object of this?

Mr. Mullender: The object of asking whether he knew there was an accident was to tie down the date, the fact that he has said what date he was in the bar, and what happened that night.

(Testimony of Thomas H. Harding.)

Mr. Calabro: I don't see what happened in the bar has anything to do with it.

The Court: As to the hour when they left. All right.

Mr. Mullender: We will show that.

The Court: Of course, if it is merely to fix a time, [152] it is all right. Otherwise there is no denial that the Government car was involved, is there?

Mr. Mullender: No, only to fix the time, your Honor.

The Court: I think you have admitted that.

Mr. Calabro: Yes, they have, in their pleadings.

The Court: I think because of that I will admit it. Go ahead. You didn't find the car when you went to work?

The Witness: No, sir.

The Court: All right. Now let's get to it. Where do you go from there?

Q. (By Mr. Mullender): Were you sent out to pick up the car?

A. No, sir, I don't think I was. The staff sergeant that worked in the office at the time was the one that was sent out.

Q. Do you know the defendant Phelps?

A. Yes, sir.

Q. Had you known him at that time?

A. Yes, sir.

Q. And did you see him at the Silver Saddle?

A. Yes, sir.

Q. Do you know about when you saw him?

(Testimony of Thomas H. Harding.)

A. It was approximately 11:00 or 11:30. That could vary on hours, though, either way.

Q. Do you know how long he had been there?

A. No, sir, I don't.

Mr. Calabro: What was the answer?

The Court: Do you know how long he had been there?

The Witness: No, sir, I don't.

Q. (By Mr. Mullender): Did you have any conversation with the defendant at the bar?

A. Yes, sir, I did.

Mr. Calabro: I am going to object, your Honor, to any conversation he may have had with the defendant Phelps on the ground it is pure hearsay against us plaintiffs, as far as we are concerned, and it constitutes pure hearsay as far as we are concerned. I don't see how it is material to the question of negligence or scope of employment, so I am going to object on the ground it is immaterial.

The Court: If it relates to his intentions as to where he was going, I think it is material. If it is as to others, it is not. But in determining the scope of employment the inquiry is legitimate.

Mr. Calabro: Then the proper question, your Honor, would be whether or not the defendant Phelps made any statement to the effect that he was going to Barstow.

The Court: He can't ask him. If he did that, you would object on the ground it is a leading question.

Mr. Calabro: I will stipulate that he may ask him that question, your Honor. [154]

The Court: Now, you were getting along very

(Testimony of Thomas H. Harding.)

nicely. Don't have me at the end of a nice day criticize you gentlemen on what you are doing. We are getting along very nicely, so let's go on. It is a nice friendly lawsuit, and let's keep it that way.

Q. (By Mr. Mullender): Will you tell me what that conversation was?

Mr. Calabro: I am sorry, your Honor,—just a moment, please, Mr. Witness. I think in view of the court's statement that perhaps the witness might properly be instructed to tell us of conversations relating to any intentions.

The Court: I am not interested in anything else. If he made any statement as to where he was going, or which way he was going, that is all we are interested in. Anything else we are not concerned with.

The Witness: Only back to the Base.

The Court: What was that?

The Witness: The only place he said he was going was back to the Base.

The Court: Now, wait a minute. You saw him first at 11:30, did you say?

The Witness: It was around 11:30.

The Court: All right. When did you leave?

The Witness: Approximately 1:00 o'clock.

The Court: Was he still there? [155]

The Witness: No, sir, he had gone.

The Court: He had gone. Can you fix the time when he left?

The Witness: No, sir, I can't.

(Testimony of Thomas H. Harding.)

The Court: You can't. What else did you have?

Q. (By Mr. Mullender): Did you observe the demeanor of the defendant in the bar?

A. What do you mean by that?

Q. Did he appear to be drunk?

Mr. Calabro: I object to that.

The Court: I am going to sustain the objection. I don't think that is material because, under the law of California, if a servant gets drunk on his job, that is the lookout of the employer, and that is not a defense.

Furthermore, you have shown nothing yet to contradict the implication of the prima facie case that shows clearly that he operated the automobile negligently, whether he was sober or not. So I don't think it is material, and, frankly, I don't want to create a record here for a court of inquiry. I am not interested in that. Let them do their own work. They pass the buck to us many a time. They did in the Shibley case. So I will pass the buck back to them, and I am not going to create a record for them, and I don't think it is material because it is not a defense.

The point you have emphasized is scope of control, [156] that it was outside of the scope of control, and that I have allowed. The other one is not material.

Mr. Mullender: Your Honor, it has always been my understanding that if the employee goes off for some purpose of his own, then he goes outside the scope.

(Testimony of Thomas H. Harding.)

The Court: That is true, but drinking is not a purpose of his own. It may be incidental. Drinking is not a part. That is not considered.

Mr. Mullender: Your Honor, do you think if a man gets drunk, good and drunk, that he is not——

The Court: I am not deciding abstract questions. The rule is that if he goes out of time and out of place. That is the law of California, and nothing governs but the law of California. The law of California is clear, and the Restatement is clear, and that is that if he goes out of time and out of place, then the question arises, and I am going to decide that at the proper time. But I don't think it is material whether he was drunk or not. I don't think it is a defense under the law of California. Suppose you have a chauffeur, and he gets drunk. You don't mean to say that that releases you from liability. You are not supposed to have a chauffeur that gets drunk, and the Government is in the same position.

Mr. Mullender: I have no other questions then, your Honor.

Mr. Calabro: No questions. [157]

Mr. Wheeler: No questions, your Honor.

The Court: All right. Step down. [158]

* * * * *

The Court: Gentlemen, I have had the benefit of counsel's research, and I have gone through a lot of research myself, so I am ready to decide this case. [199]

We may as well start with this proposition, which is the last one counsel adverted to, and that is, that

we can excuse this soldier because, while he was asleep, somebody drove the car.

We go back to the familiar proposition that drunkenness is a voluntary act, and it does not excuse anything that happened. The only materiality it has in a case involving a criminal offense is that the man may be so drunk that he may not be capable of forming a specific intent, and those offenses require specific intent.

You may apply the same thing to sleepiness. A man cannot shift responsibility by merely saying, "I turned this automobile over to a soldier to drive, and I was asleep while he drove." The answer is that the act of the soldier he picked up was his act, because he voluntarily, not in a case of extremity, not in a case of what we call in Roman law force majeure, but he voluntarily picked up the soldier and then let him drive.

He doesn't tell us whether he let him drive immediately after he got in or whether he turned over the car after they had been on the road a part of the way.

So we eliminate any question of coercion, or any question of shirking of responsibility, and we hold the defendant Eugene Phelps liable for whatever happened from the time he turned over the car to the other soldier, because that [200] was a voluntary act. Furthermore, it was an act which he knew was in violation of every rule, and, therefore, the voluntariness must be assumed in view of the knowledge that it was a violation of all rules, which prohibited any military equipment to be driven by

unauthorized personnel, and which prohibits any military personnel from turning over the driving of a car or to entrust it to somebody else who is not in the same field, who does not have the same authority, and who is not along on the same trip.

We eliminate right from the start the fact that this soldier picked up another soldier who, while he was asleep, drove him to a place to which he did not want to go.

If he had stood by the side of the road, and somebody had picked him up, we might consider that, but even then we might say, "What business did he have standing by the side of the road and leaving the keys in, so that a stranger could pick him up and drive him?" But we don't have that situation. So the G.I. whom he picked up and who drove him to Barstow was his agent, and if he drove him to a place other than a place he wanted to go to, he must bear the responsibility, because he made it possible. Not the Government, but he himself, by violating positive instructions, made it possible for the man to do that, and so he is held responsible.

That brings us to the proposition that the Federal Tort Claims Act does not establish absolute liability. [201]

The section reads, and let me get that. It is now a part of the Judicial Code, and I think it is Section 921. Let's look at it again. I don't seem to find it quickly, but I have the quotation in front of me. The section says that the Government is liable for acts caused by the negligence or wrongful act of

an employee while acting within the scope of his office or employment.

While I am personally of the view that the scope of employment must be determined by local law, ultimately, because it is a mixed question of law and fact, it becomes unimportant because, as I said during the discussion, in determining whether a thing is or is not in the course of employment we must determine the nature of the relationship between the soldier and the Government.

In the case of Williams vs. United States, to which counsel for the Government referred, the court refers to a case which arose in my court, United States vs. Standard Oil Company of California, 332 U.S. 301, in which the court held that the relationship between the Government and the soldier is a peculiar type of relationship, and the court declined to approve a judgment I rendered in favor of the Government to recover for injuries caused to a soldier by a truck driven by an employee of the Standard Oil Company.

I held that whether strictly speaking there was a relationship of employer and employee, or any other relationship, [202] it is a relationship which should be recognized in law, and a man who injures that relationship should, in the present view of the law, be held responsible. The strange part of it is that England, where the doctrine of relationships arose, and from whom we borrowed it, did not have any difficulty in holding a third person liable in a suit of the Crown, and that is the case I followed, but the Supreme Court declined to follow the Eng-

lish cases and held that it was a matter that Congress had evidently overlooked, and that, therefore, the Government could not recover.

Incidentally, that case went all the way to the Supreme Court because there were $3,000,000 worth of claims which the Government was asserting for injuries to soldiers, and that is why a case which involved only $190 made its way all the way to the Supreme Court of the United States because of the importance of the issue.

Now, regardless of that, it seems to me that this problem can be solved very easily if we apply California law, which gives the plaintiffs the benefit of a more liberal approach than if we approach it strictly from the standpoint of the military law.

Counsel has correctly stated the conditions which must occur before we determine whether an act done by an employee is or is not in the course of employment. I will quote from his own case, the one which he cites, Loper vs. Morrison, because it is a leading case on the subject. That is in 23 C. 2d 600, and I quote from Page 606:

"* * * under these authorities the factors to be considered, in so far as pertinent to this case, are the intent of the employee, the nature, time, and place of his conduct, his actual and implied authority, the work he was hired to do, the incidental acts that the employer should reasonably have expected would be done, and the amount of freedom allowed the employee in performing his duties."

Then the court made this remark, and that is why I say when you are reading language of the

Supreme Court before a jury, it is one thing. When you are arguing to me as a jury what to find, it is an entirely different thing. This is what the court said:

"Under the circumstances of this case we cannot hold as a matter of law that Morrison's trip to the tavern and to Dolan's home constituted an abandonment of his employer's business. As said heretofore, it was within Morrison's authority to collect accounts at the time the accident occurred. The employer's liability was not necessarily terminated by reason of the fact that Morrison combined a private purpose of his own with the business of his employer."

Now, remember, he was using his own automobile. [204] He was not driving a company truck. He was using his own automobile to collect accounts after hours. Therefore, he had a right to determine when he was going to do it, and which way he was going to go, and the jury having decided in his favor—this was a verdict, with judgment for the plaintiff—the jury having decided in his favor, the majority held that they could not disturb it because they could not say as a matter of law that he was outside of the course of his employment.

There was a very strong dissent by Judge Trainor, joined in by Judge Edmonds, and he argued that the facts were undisputed, and it was his view that it was a question of law.

At any rate, the elements I have enumerated, including the freedom allowed to the employee while he is exercising the powers of employment, is of

great importance, and it brings in once more the question of military discipline, and that a person subject to military discipline does not have the freedom that an employee, even a chauffeur, has in these circumstances.

That is why in one of the late decisions on the subject the Court of Appeals has said that if you tried to fit cases into a particular groove, you can find cases both ways through the reports, but the difficulty is that each case must be determined according to its own facts, and that when [205] you do that, then the apparent inconsistency disappears.

One of the cases I refer to is Tyson vs. Romey, 88 C.A. 2d 752. In that case a jury had found that the act was in the scope of employment, and awarded $18,500, and this is what the court said, and it is very significant, in that they cite a lot of cases that have been cited here on one side or the other, including Gordoy vs. Flaherty. They say this:

"Numerous citations may be supplied seemingly upholding inconsistent views on the scope of employment as applied to the 'going and coming' rule on facts based upon actual or implied findings. Among appellants' citations are found: Nussbaum vs. Traung Label & L. Co., 46 C.A. 561; Bayless vs. Mull, 50 C.A. 2d 66; Postal Tel.-Cable Co. vs. Industrial Accident Commission, 1 Cal. 2d 730; Gordoy vs. Flaherty, 9 Cal. 2d 716. Plaintiffs' list is headed by Richards vs. Metropolitan Life Insurance Co., 19 Cal. 2d 236; Robinson vs. George, 16 Cal. 2d 238, and Curcic vs. Nelson Display Co., 19 C.A. 2d 46. It is not necessary to analyze the above or other

cases. The rule is that when there is a substantial departure by the agent from his principal's business, the principal is not liable, but the opposite conclusion should be reached if the act or conduct of the agent is fairly and reasonably an incidental event or circumstance [206] connected with the assigned work."

So that if it constitutes a substantial departure from the business, there is no liability. It is very significant that this refers to the Restatement of the Law on Agency, and I will read you the section to which it refers, and one or two others which are very significant here. They refer to Section 228 of the Restatement on Agency, and this is the italicized portion which sums up the rule:

"(1) Conduct of a servant is within the scope of employment if, but only if:

"(a) it is of the kind he is employed to perform, as stated in Section 229;

"(b) it occurs substantially within the authorized time and space limits, as stated in Sections 233-234;"——

Let's keep those words in mind, "authorized time and space limits."

"(c) it is actuated, at least in part, by a purpose to serve the master, as stated in Sections 235-236."

That was (1)(a), (b), and (c). Then:

"(2) It is a question of fact, depending upon the extent of departure, whether or not an act, if performed in its setting of time and place, is so different in kind from that authorized, or has so little

relation to the employment, that it is not within its scope." [207]

We do not need to read Section 229, although it may help to refer to some of the conditions:

"(1) To be within the scope of the employment, conduct must be of the same general nature as that authorized, or incidental to the conduct authorized."

There, again, is where the military discipline comes in. It must be authorized. (Continuing):

"(2) In determining whether or not the conduct, although not authorized, is nevertheless so similar to or incidental to the conduct authorized as to be within the scope of employment, the following matters of fact are to be considered:

"(a) whether or not the act is one commonly done by such servants;

"(b) the time, place and purpose of the act;

"(c) the previous relations between the master and the servant;

"(d) the extent to which the business of the master is apportioned between different servants;

"(e) whether the act is outside of the enterprise of the master or, if within the enterprise, has not been entrusted to any servant;"——

I do not think that the other conditions need be read, because those given in (a), (b), and (c) are controlling, whether it is commonly done by the servant. [208]

Here we are confronted with a situation where he admits going out of the way, and especially entrusting another soldier with the control of the car,

which is not commonly done in the performance of that duty.

Then we come to the other section to which they refer, and there we come within the limitation, the relationship of time and space:

"233. Time of Service. Conduct of a servant is within the scope of employment only during a period which is not unreasonably disconnected from the authorized period."

Then in the comment it says:

"The employment exists only during the time when the servant is performing the work which he is employed to do. It does not begin at the time when it is necessary for him to act in order to perform the required service. It begins only when the master may direct the method by which the servant is to perform the work, and terminates when the master may no longer control it. When it begins and terminates is determined by the terms of the employment and all the facts of the situation. The period during which the master may control the doing of acts, if any are done, is somewhat broader than the period in which the master has a right to direct that the servant do something." [209]

Now, of course, we are confronted with the problem that the soldier is on 24-hour duty, and may be ordered to do certain things. But it is not contended, and it cannot be contended that it was necessary for him to be where he was, far away from his route, at 5:00 o'clock in the morning, when in the ordinary course of events he could have re-

turned, allowing ample time to eat, by midnight of the night before.

So that the element of time, assuming that he was to perform it within a reasonable time, and assuming that he did not deliberately take time off to sleep, as he had a right to do, that it wasn't one of those conditions, because he actually maintains that they never stopped on the road for that purpose, that they were on the go all the time, although it is difficult to account for what he did between 7:00 o'clock, when he had dinner at Pasadena, and if we allowed one hour for that, what he did between 8:00 o'clock and 5:00 o'clock in the morning, and why it took that length of time to traverse that distance. Even if we take his own word, that he left the bar at about 11:30, when that other soldier saw him last, it is very difficult to account for a period of over five hours, with a distance of only about 60 or 70 miles.

Now, another comment in Section 234, as to which it refers, says:

"Conduct is within the scope of employment only [210] in a locality not unreasonably distant from the authorized area."

This is a reasonable rule, which these cases follow, and that is, if you tell a man to go a certain way, if he makes a reasonable departure from that area, and the accident occurs during that departure, they will be held liable. But if the departure is way out of line, even if he seeks to perform business of the employer which he might have performed if so directed, the court holds that the em-

ployer is not liable, and the annotators say in Illustration 2:

"P directs A, a traveling salesman supplied with a car, to sell goods only in Albany. The salesman drives to Schenectady to sell goods to a merchant there. While driving in Schenectady A is not within the scope of employment."

Here is a very good illustration, where even though he was doing the same thing in Schenectady that he was to do in Albany, where his direction was to transact business in Albany only, the liability does not attach. Then in the comment the annotators say this:

"The fact that the act is not done at the authorized place is always a fact to be considered in connection with the other elements (nature of the act, the time, and the purpose) which determine whether or not the act is within the scope of employment. Thus, [211] an act which is a slight departure from that authorized as to its nature, place, and time of performance may be found to be not within the scope of employment, while a similar act done at the required place and time, or an authorized act done at a slightly different place or time, would be within the scope of employment."

Then there is another comment which I will not read, which says that a departure is a matter of degree.

Now, as I said, you can find cases that suit almost every situation. Some of the cases cited by counsel for the plaintiffs are easily distinguishable. But I have two California cases, and they have been cited

repeatedly ever since, and are cited even in this last case in 23 Cal. 2d. The first one is the Kish case, and the courts have referred repeatedly to the Kish case, and to the other case, a later case which followed it, which to my mind are the closest to the case before us.

Kish vs. California State Automobile Association, 190 Cal. 246, was a case where an employee was employed to install road signs, and one evening after his job had been completed he took himself and some friends to supper in the city, and the question arose whether that was an incidental use, and the court said it was not. The court unanimously sustained a judgment of non-suit, granted by the Superior Court of Fresno County, with all the justices participating, [212] although for some reason which does not appear Mr. Justice Waste was disqualified. I think it was just right after he had come from the District Court of Appeals, and it may well have been that he had written the Court of Appeals decision in the case before it went to the Supreme Court. I don't know why. At any rate, it shows all of the justices concurring, Justices Lawlor, Shaw and Sloane, Justice Lennon writing the opinion, and Judge Waste, being disqualified, did not participate. This is what the court says:

"It may be conceded that the use of the truck for transportation to and from their work to their home was for the benefit of the employer indirectly for the reason that it permitted them to devote more time to accomplish the results of installing road signs, for which they were employed. Also,

from the fact that they had what may be termed a 'roving commission,' having no fixed hours of employment and no fixed place of employment, it may be admitted that their employment commenced when they left the house in the morning and did not terminate until they returned in the evening. This point was, however, the utmost boundary of their employment and was not enlarged by the fact that they were permitted the use of the truck in going to places to get their meals. This was permitted solely for the accommodation of the employees themselves. We cannot assent to the [213] reasoning of plaintiff that because it was necessary for employees to eat and sleep in order to perform the labor for which they are employed that these acts are incidental to their employment."

In other words, if during the period of employment they had to eat, they could use the car, but after the day's work was over the boundary was exceeded. So that we have a case here where the court said if that same thing had been done during the daytime, while he was still on the job, they would have been liable, but because it was done after the job was terminated, the boundary had been breached.

Now, the case which I think is closest to the present case is Gordoy vs. Flaherty, which, by the way, is cited by Judge Mathes, and also cited by the Court of Appeals in the Williams case.

In that case, which is reported at 9 Cal. 2d 716, there was a verdict for the plaintiff. Bear in mind that the Court of Appeals and the Supreme Court

of California had held that the question was a question of fact, generally, but in that particular case they felt there was such a departure that they could decide it as a question of law, and the judgment of the Superior Court was reversed. It is a very brief opinion. It is a per curiam opinion, which means that it is a composite piece of work. Having sat on the Court of Appeals, I know what per curiams are. I just signed one yesterday, a per [214] curiam on a rehearing, because each of the three of us had ideas, and one judge formulated them into one form, and we all signed it.

Now, Flaherty was employed by the Union Oil Company as a service station attendant. I will read the portion of the opinion that gives his duties:

"* * * As part of his duties Flaherty was occasionally required to go into town to get change, and also to turn in money to the branch office of the company. There was no route prescribed for these errands. Just before noon on the day of the accident, Flaherty took his own automobile, drove to the bank to get change, intending thereafter to proceed to the branch office of the company to leave his money."

Now, mark you, this is what we call a return trip case. His original trip or his straight trip was all right. He had gone to the bank to get change, which was all right. Now, let's see what he did on the return trip: (Continuing)

"While he was stopping at the bank, Mrs. Frantz, mother of a friend and fellow employee, asked him to take her to her home in Santa Clara, a few miles

away from San Jose. He agreed, and after assisting her into the car with her parcels, he proceeded to drive on toward the company office. But instead of stopping there, he kept on driving in the direction of her home. The collision [215] took place three blocks past the office."

In other words, on his return trip he did pass the office, so to that extent he was on the same route, but he had passed it by three blocks when the accident occurred on the same street. This is what the court said:

"It seems perfectly clear that at the time of the accident Flaherty had departed from his employment and was performing services for another, outside its scope. This is not a case of a choice of different possible routes, or minor or immaterial deviations in the course of a business errand. If Flaherty had taken Mrs. Frantz as a passenger, and driven her to some point between the bank and the branch office, or had even deviated by a short distance from the most direct route, it might still be held that he was within the general scope of his employment at the time of the accident * * * But it was not a mere deviation when he actually passed the company office and proceeded in the direction of a place which had no relation to the company business. This was a real departure from the employment, despite the fact that he intended subsequently to return to his employer's business; and during such departure the employer was not liable for the employee's tort."

And they cite the Kish case, Kish vs. California

State Automobile Association, and also a New York case, and [216] a New Hampshire case. Then they tried to show that it was a customary courtesy extended to an employee, but they said there is no evidence that the company had any knowledge, and so forth.

Now, while it is very difficult in these cases to find any case that is identical as to facts, it seems to me that that case is about as favorable to the plaintiffs' contentions as there could be, because there the man had not actually reached the neighboring town. He was still on the same street where the office was. He had passed it, but he intended to go to this town a few miles away. Nevertheless, the court held that it was a separate, distinct enterprise from that upon which he was engaged. That conforms to the statements in the Restatement, and to the illustrations as given in the Restatement.

Now, if we apply the principles of these cases to the facts here, we are confronted with the proposition that this soldier was told to take an officer to the International Airport, that the International Airport is in the outskirts of Los Angeles, and that instead of that, the officer preferred that he be dropped in Los Angeles, so that the ultimate destination of the trip was as was intended, and the officer had the right to tell him to drop him there. As I said during the course of the argument, it may well be that he did not have a definite plane reservation, and probably [217] thought it might be difficult to get one at that time of the day, so decided to stay overnight. The hotel register shows that he

left at a very early hour, and we all know that these various airplane companies maintain bus service from the Biltmore, so that he probably decided his chances of getting on a plane without a definite reservation were better at that time, or he may have gotten a reservation after he got to his room, and left in the morning.

At any rate, we are not concerned with that, because the mere fact that he was destined for the International Airport and instead came to Los Angeles does not have any particular significance.

What we are concerned with is the time element and the place element. The record shows that he got here at 6:05 p.m. That is the time that the officer registered, and the soldier did not stay at a hotel. The soldier started on his way back, and he himself tells us that he started back, that he went to Pasadena and there stopped to have dinner, and from there he went on to San Bernardino. There the trail becomes confused, because all we know is that he stopped at the bar and had a couple of beers, as he calls them. That is a soldier's expression for drinking, no matter what they drink. I am inclined to think, as a matter of fact, that you could almost take judicial notice of the fact that a soldier very seldom drinks beer. At any rate, he had a couple of beers. And, as I said, I do not want to make a record for a board of inquiry, because he suffered very serious injury in the accident, and I did not allow any further inquiry into that. At any rate, he was seen there at 11:30. Then we find him in this accident. Of course, he suffered a head

injury, and he does not remember what took place before.

All he remembers is that he picked up a soldier, asked him to drive, told him where he was going, and said to be sure to wake him up. Now, of course, the turning over of a vehicle to another person was a violation of the military regulations. I do not need to decide whether in so doing the Government would be liable if the accident had occurred while the other soldier was driving. We do not need to decide that here because that was not the case.

The soldier evidently drove him safely to Barstow, which is way off from his destination, and he must have known that the soldier was going to Barstow, although he says now he does not remember, because otherwise the only other inference that could be drawn would be that the soldier told him he was going to the same camp. He was not going to the same camp because he did not have on the same uniform. There are no Marines on that Base, and there is no infantry on that Base. He said it was either a Marine or an infantry soldier, and that he was not an airman. So he must have known he was not going to the same place, even though he does not remember. [219]

I don't think the soldier is being untruthful, and I take judicial notice of the fact that when an injury of this character takes place it is very difficult to remember what had taken place before. I am merely pointing to the fact that the probabilities are that he knew where the soldier was going, because there was no such personnel at the camp to

which he was going. Evidently, he thought, "Oh, well, we will take you there, and then go back, and nobody will know the difference. It is late at night."

If he had said that he had told him to wake him up when he got to the cross-roads, where the roads fork, one going to Barstow and the other to the camp, the story would be plausible. But the story he tells is not a plausible story.

Why should a soldier who does not belong to that camp want to be taken to the camp. They would not even let him in. The sentry would not allow him to go in. They would ask him what he was doing there.

So the presumption must be that he knew that this man was going to Barstow, and he probably said, "That's all right. Let's go to Barstow, and then you get off there, and you wake me up, and I will drive the other distance. It is only 25 miles away, and it is late at night, and it will be all right."

I am making this assumption because I am the trier [220] of the facts, and I am to judge the credibility of the witnesses, and that portion of the story simply did not ring true to me, because it is preposterous. Even taking the defendant Phelps' version of the situation, I know enough about soldiers to know that if the fellow had said to him, "Look, it isn't a case of going to another town," or to say to a fellow, "You come and bunk with me," well, you do not do that in the Army.

So the other soldier had no business whatsoever to transact at the Air Force Base, where he was

going, and the only assumption that can be made is that Phelps knew all the time they were going to Barstow, that he agreed to the deviation, thinking that everything would be all right, that he would get over his sleepiness, caused by the lack of sleep the night before, or by the two beers he drank, and that by the time he got to Barstow he could drive on, and that nobody would kick because he could say, "Oh, well, I got sleepy, and had to sleep before I came back," and nobody would discipline him for that because the hour of his return was not put down in writing. He was expected to return at a reasonable time.

So the only inference to be drawn from the fact is that Phelps knew that they were departing from the regular road, and that they were taking additional time to do it, that he was doing what he thought was a good act to a fellow soldier who needed transportation, and he thought he could get [221] by with it, that everything went along all right until they got to Barstow, and the accident occurred when he started on his way back.

Then let's put it the other way. Let's assume that the story Phelps told is true, and I am using the word "story" not in an opprobrious sense, but in the way a newspaper man uses it,—any narrative, not a fictitious story, and that the version—let's call it the version—that he gave at the interview with this soldier is true. Let us assume that is true. It does not help the situation, because he cannot avoid the voluntary character of his own act in departing from the route and going upon a side trip, because

he entrusted the car to the other soldier, he went to sleep, and if the other soldier broke his agreement with him, he is charged with what the other soldier did.

Therefore, the departure, even though it occurred during the time when he was asleep, was his departure, and the accident did not occur in the scope of his employment. So whether you take his story at its face value, or whether you discount it, as I am inclined to do, because it does not sound reasonable that a soldier who is stationed in Barstow, or somewhere else, would want to land in an airfield where he had no business being, the fact remains that he deliberately chose to depart from the task that he was about, and the task was to return as quickly as possible to his Base by the ordinary [222] route after he had dropped off his passenger. He did not do that. He went upon a side trip of his own, and that was just as much a departure as the departure of the employee of the Union Oil Company, who started to take the mother of a fellow employee to a neighboring town, and had an accident on the same street on which the employer's business was located, and only three blocks away.

So the judgment will be for the Government, that the plaintiffs take nothing against the United States of America by reason of the complaint, on the ground that the accident was not caused by an employee of the Government while acting within the scope of his office or employment.

On the contrary, it was caused while an employee of the Government in charge of military equipment

deliberately departed on a venture of his own in order to accommodate another soldier, and that in both time and place it was a complete departure, which exonerates the Government from liability.
* * * * * [223]

[Endorsed]: Filed July 28, 1955.

[Endorsed]: No. 14926. United States Court of Appeals for the Ninth Circuit. Pacific Freight Lines and Sidney S. Russell, Appellants, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: October 28, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14926

PACIFIC FREIGHT LINES and SIDNEY S. RUSSELL, Appellants,

vs.

UNITED STATES OF AMERICA, Appellee.

STATEMENT OF POINTS

The points upon which appellants will rely on appeal are:

1. The court erred in failing to conclude as a matter of law that Eugene A. Phelps was acting within the scope of his office or employment.

2. The court erred in finding that defendant Eugene A. Phelps was ordered to return immediately to George Air Force Base after the officer had been delivered to said airport.

3. The court erred in finding that defendant Eugene A. Phelps was not acting within the scope of his office or employment at the time of the collision.

4. The court erred in its failure to find on a material issue, to wit: whether the hitchhiker was acting within the scope of his office or employment in driving the vehicle of defendant United States of America to Barstow, California.

5. The court erred in its failure to find on a

material issue, to wit: whether the accident of the hitchhiker in driving the vehicle of the defendant United States of America to Barstow, California is chargeable to the defendant United States of America.

6. The court erred in its Conclusion of Law III that defendant United States of America is entitled to a judgment against the plaintiffs, Pacific Freight Lines and Sidney S. Russell, and each of them, dismissing their Complaint, and for its costs of suit.

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[Endorsed]: Filed November 4, 1955. Paul P. O'Brien, Clerk.

No. 14,926

IN THE

United States Court of Appeals

For the Ninth Circuit

PACIFIC FREIGHT LINES and
SIDNEY S. RUSSELL,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the United States District Court for the Southern District of California, Central Division.

APPELLANTS' OPENING BRIEF.

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No. 14,926

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vs.

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Appellee.

On Appeal from the United States District Court for the Southern District of California, Central Division.

APPELLANTS' OPENING BRIEF.

JURISDICTIONAL STATEMENT.

Appellants brought suit (R. 8) against the United States under the Federal Tort Claims Act, 28 U.S.C. 1348(b), 2671 et seq., in the United States District Court for the Southern District of California, Central Division. The case was tried without a jury before Honorable Leon R. Yankwich, Judge Presiding, whose memorandum opinion is reported at .....F. Supp ..... Judgment for United States was entered on the 6th day of May, 1955. (R. 21.) Notice of appeal was filed by appellants on the 27th day of May, 1955. (R.

22.) The jurisdiction of this Court is invoked under 28 U.S.C. 1291.

STATUTES INVOLVED.

Sections 1346(b), 2674, and 2671 of Title 28 U.S.C. (the reenactment of the Federal Tort Claims Act, 62 Stat. 933, 982, 983) provide in pertinent part:

"Section 1346. United States as defendant.

* * * * * *

"(b) Subject to the provisions of chapter 171 of this title, the district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January, 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

* * * * * *

"Section 2674. Liability of United States.

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

* * * * * *

"Section 2671. Definitions.

As used in this chapter and sections 1346(b) and 2401(b) of this title, the term—

* * * * * * *

"Employee of the government includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

"Acting within the scope of his office or employment, in the case of a member of the military or naval forces of the United States, means acting in line of duty."

STATEMENT OF THE CASE.

This is an appeal by plaintiffs-appellants from a judgment for defendant-appellee, the United States. This action was brought by plaintiff, Pacific Freight Lines for property damage and by plaintiff Sidney S. Russell for damages for personal injuries, arising out of a collision between a vehicle driven by plaintiff Russell and owned by plaintiff Pacific Freight Lines and a vehicle owned by defendant United States of America and driven by Eugene A. Phelps, a member of the United States Air Force. Judgment was rendered in favor of plaintiff Pacific Freight Lines in the sum of $4,264.07 and in favor of plaintiff Russell in the sum of $1,668.66 against defendant Phelps and in favor of the defendant United States and against the plaintiffs.

The sole issue herein is whether Eugene A. Phelps was acting within the scope of his office or employment at the time of the collision.

Defendant Eugene A. Phelps was at the time of the collision stationed at George Air Force Base, Victorville, California, and was employed as a driver in the motor pool there. (R. 14 [Findings of Fact I].) Defendant Phelps negligently caused the vehicle he was driving to cross over the center line where it collided with plaintiff-appellants' truck.

The collision occurred between 5:00 and 5:30 a.m. on U.S. Highway 66 at a point approximately 25 miles east of the point on U.S. Highway 66, where said highway is intersected by the road to George Air Force Base. (Finding XV; R. 16.)

At the time of the collision defendant Phelps was driving the vehicle of defendant United States in a general westerly direction (R. 31) while plaintiff Russell was driving plaintiff Pacific Freight Lines' vehicle proceeding in a general easterly direction. (R. 25, 31.)

On February 5, 1954, and for some time prior thereto the motor pool at George Air Force Base was short of personnel; this shortage included drivers. (R. 58, 61, 90.) The drivers assigned to the pool were driving for longer periods of time than reasonable. (R. 61.) On February 4 defendant Phelps had gone to work

at 7:30 a.m. after having had only four hours sleep. (R. 88.) On February 3, defendant Phelps had gone to work at 7:30 a.m. and worked until 2:00 a.m. on February 4. (R. 87.)

At approximately 3:00 p.m. on February 4, defendant Phelps was ordered to drive an Air Force officer from George Air Force Base to Los Angeles (R. 14 [Finding II]). Defendant Phelps was issued a driver's trip ticket, DD form 110 (Defendant's Exhibit A) in evidence. (R. 55-56.) Air Force personnel who are dispatched with a vehicle and trip ticket are on duty. (R. 42-43.) A trip ticket does not designate the route to be taken. (R. 43.) No order was given to defendant Phelps designating the time at which he was to return to the base. (R. 44.) Return times for drivers of the motor pool at George Air Force Base are not checked too closely. (R. 47, 48.) Defendant Phelps understood that after delivering his passenger he was to return immediately to George Air Force Base. (R. 68.) It was his duty to do so. (R. 43.) It is, however, the practice of the motor pool to allow a driver away from the base to take time out for meals. (R. 48.) It is also the practice of this motor pool to allow a driver, when he becomes sleepy on trips, to pull his car into a place of safety to sleep and to return to the base after he has rested. (R. 91.) It is also the practice of those in charge of the motor pool to accept at face value a driver's explanation of a late return to the base. (R. 91.) The drivers in the motor pool are not allowed to entrust the vehicle to anyone else.

Defendant Phelps had been assigned to drive an officer to Los Angeles; Los Angeles is approximately 115 miles west of George Air Force Base (R. 14 [Finding III]). Defendant Phelps delivered his passenger to the Biltmore Hotel in Los Angeles at approximately 6:00 p.m. on February 4 and began his return trip (R. 15 [Finding V]). He stopped in Pasadena, at approximately 7:00 p.m. for his dinner. (R. 15 [Finding VI].) He later stopped at a cafe in San Bernardino. He left there at approximately midnight and continued upon his return trip. (R. 15 [Finding VIII].) Before leaving the cafe, however, he declared to an acquaintance he met there his intention to return to the base. (R. 98.) Defendant Phelps was very tired. (R. 80.) At the junction of U. S. Highways 395 and 66 defendant Phelps picked up a hitchhiker in uniform and who was either in the Army or the Marine Corps. (R. 82-83.) Defendant Phelps asked the hitchhiker to drive the car. (R. 16 [Finding X].) Defendant Phelps, called by the defendant United States as its own witness (R. 65-66), testified that he asked the hitchhiker to drive to Victorville and to wake him up when they got to Victorville (R. 80, 85). Defendant Phelps was having engine trouble. (R. 52, 54, 85.) He told the hitchhiker not to drive it too fast. (R. 85.) The hitchhiker drove the car in an easterly direction on U.S. Highway 66 and defendant Phelps went to sleep. (R. 16 [Findings X and XI].) When defendant Phelps woke up he was in Barstow. It was 5:00 a.m. and he was 35 miles beyond the point he was to have turned off U.S. Highway 66 to return to

George Air Force Base. He immediately proceeded to drive toward the Air Force Base. (R. 81, 91.) The collision occurred when he was approximately 25 miles short of his destination, George Air Force Base. (R. 16-17 [Finding XV].)

SPECIFICATION OF ERRORS.

(1) The trial Court erred in failing to conclude as a matter of law that Eugene A. Phelps was acting within the course and scope of his office or employment.

(2) The Court erred in finding that defendant Eugene A. Phelps was not acting within the scope of his office or employment at the time of the collision.

(3) The Court erred in its failure to conclude as a matter of law that the conduct of the hitchhiker in driving the vehicle of defendant United States to Barstow, California, was chargeable to defendant United States.

(4) The Court erred in its conclusion of law III that defendant United States of America is intitled to a judgment against the plaintiffs Pacific Freight Lines and Sidney S. Russell and each of them and in dismissing their complaint.

SUMMARY OF ARGUMENT.

This case is controlled by the California doctrine of respondeat superior.

Defendant Phelps having been carried off his course by the hitchhiker against his will and while he was asleep never departed nor deviated from the course and scope of his employment. There is no evidence to sustain a finding that defendant Phelps departed from or was acting outside the scope of his office or employment.

The trial Court erred in its failure to conclude that as a matter of law the conduct of the hitchhiker was chargeable to defendant United States. The California authorities compel the conclusion that the conduct of the hitchhiker in driving the car of defendant United States beyond the area of defendant Phelps' course are chargeable to defendant United States. Under California law, an agent in charge of an instrumentality of his master retains custody when the third party to whom he has transferred its possession acts in the person of the agent and the master is liable for the acts of the transferree.

Since the only issue is whether defendant Phelps was acting within the scope of his office or employment, and since the only evidence on the issue came from the witnesses of defendant United States and is uncontradicted, this Court can and should determine the issue in appellants' favor and direct entry of judgment against the defendant United States and in favor of appellants.

ARGUMENT.

I.

THIS CASE IS CONTROLLED BY THE CALIFORNIA LAW OF RESPONDEAT SUPERIOR.

Prior to the per curiam opinion of the United States Supreme Court in Williams v. United States, ... U.S. ....., filed October 17, 1955, there was some doubt whether Federal law or the law of the place controlled the determination of whether a member of the Armed Forces of the United States was acting in the course and scope of his employment. See *Williams v. United States* (9 Cir. 1954), 215 F. 2d 800 and *United States v. Campbell* (5 Cir. 1949), 172 F. 2d 500. This doubt, occasioned by the apparent inconsistency between the provisions of Sections 1346(b) and 2671 of Title 28 U.S.C., was resolved by the Supreme Court in the *Williams* case. The United States Supreme Court there held that the question is controlled by the law of the place.

II.

THE COURT ERRED IN FAILING TO CONCLUDE AS A MATTER OF LAW THAT DEFENDANT PHELPS WAS ACTING WITHIN THE SCOPE OF HIS OFFICE OR EMPLOYMENT.

Defendant Phelps was driving a vehicle owned by defendant United States. He was on duty. He allowed another to drive the vehicle. While asleep he was carried outside the authorized space limits of that duty. When he awoke he immediately entered upon the return to the authorized space limits of his duty.

The factors to which this Court must look to determine whether Phelps was acting in the course and scope of his employment as set forth in Section 228 of the Restatement of Agency are in accord with the California authorities.

RESTATEMENT OF AGENCY

§ 228. *General Statement.*

(1) Conduct of a servant is within the scope of employment if, but only if:

(a) it is of the kind he is employed to perform, as stated in § 229;

(b) it occurs substantially within the authorized time and space limits, as stated in §§ 233-234; and

(c) it is actuated, at least in part, by a purpose to serve the master, as stated in §§ 235-236.

(2) It is a question of fact, depending upon the extent of departure, whether or not an act, as performed in its setting of time and place, is so different in kind from that authorized, or has so little relation to the employment, that it is not within its scope.

Loper v. Morrison, 23 C. 2d 600, 605 (145 P. 2d 1):

"In each case involving scope of employment all of the relevant circumstances must be considered and weighed in relation to one another. Under these authorities the factors to be considered, insofar as pertinent to this case, are the intent of the employee, the nature, time, and place of his conduct, his actual and implied authority, the work he was hired to do, the incidental acts that

> the employer should reasonably have expected would be done, and the amount of freedom allowed the employee in performing his duties. (Authorities.)"

Undue emphasis should not be placed upon any one of these factors. Restatement of Agency, Section 228, Comment (b):

> ". . . Where a servant is acting close to, although not within, the authorized place or time, or where the act is similar to one authorized, all the facts must be considered to determine responsibility for his conduct, both as bearing upon the question of whether or not his conduct is sufficiently near to that authorized to cause the master to be subject to liability, and upon the question of whether or not in absence of specific evidence of the purposes of the servant he has the purpose of acting within the employment."

Phelps was doing the job he was employed to perform. Phelps' sole purpose was to return the car to the George Air Force Base. The trial judge placed undue emphasis upon the time and space limits. It is not disputed that Phelps was outside the authorized time and space limits of his duty. Nor is it disputed that Phelps was without authority to be there. These facts, by themselves, do not place Phelps outside the scope of his employment. During all this time Phelps was subject to the control of the defendant United States and though the claimed departure was without express authority, it was not such as would relieve

defendant United States of responsibility for his actions. Section 229, Restatement of Agency:

"§ 229. *Kind of Conduct Within Scope of Employment*

(1) To be within the scope of the employment, conduct must be of the same general nature as that authorized, or incidental to the conduct authorized.

(2) In determining whether or not the conduct, although not authorized, is nevertheless so similar to or incidental to the conduct authorized as to be within the scope of employment, the following matters of fact are to be considered:

(a) whether or not the act is one commonly done by such servants;

(b) the time, place and purpose of the act;

(c) the previous relations between the master and the servant;

(d) the extent to which the business of the master is apportioned between different servants;

(e) whether the act is outside the enterprise of the master or, if within the enterprise, has not been entrusted to any servant;

(f) whether or not the master has reason to expect that such an act will be done;

(g) the similarity in quality of the act done to the act authorized;

(h) whether or not the instrumentality by which the harm is done has been furnished by the master to the servant;

(i) the extent of departure from the normal method of accomplishing an authorized result; and

(j) whether or not the act is seriously criminal."

Lowe v. United States, 83 F. Supp. 128.

One could not seriously question the fact that the act of entrusting the driving of cars owned by defendant United States is one often done by persons driving those cars. Nor can one seriously question the fact that such drivers take said cars outside the time and place limitations of their duty.

That Phelps was acting for the purposes of the defendant United States, in whole or in part, was established by the uncontradicted evidence in this case. See Restatement of Agency, Section 236:

"*Conduct Actuated by Dual Purpose.*

An act may be within the scope of employment, although done in part to serve the purposes of the servant or of a third person.

(a) Although a person cannot, by the same act, properly serve two masters whose wills are opposed, he may, as stated in § 226, serve two masters both of whom are interested in the performance of the same act. The rule stated in this section, however, goes beyond that situation and includes one in which the servant, although performing his employer's work, is at the same time accomplishing his own objects or those of a third person which conflict with those of the master. This is true not only as to the act done but as to the manner of doing it.

(b) The fact that the predominant motive of the servant is to benefit himself or a third person does not prevent the act from being within the scope of employment. If the purpose of serving the master's business actuates the servant to any appreciable extent, the master is subject to liability if the act otherwise is within the service, as where the servant drives rapidly, partly to deliver his master's goods, but chiefly in order that he may terminate his day's work or to return the vehicle to the master's premises. So also, the act may be found to be in the service where not only the manner of acting but the act itself is done largely for the servant's purposes. Thus, where the servant desires to make a brief detour of his own and for the purpose of expediting such trip places the employer's goods by the roadside, intending to pick them up later, the act of so placing them may be found to be within the scope of employment."

The uncontradicted evidence establishes that the previous operation of the motor pool and the supervision of its drivers lent itself to the creation of the situation presented by this record.

The uncontradicted evidence clearly establishes that defendant United States had adequate reason to expect the conduct of defendant Phelps.

Phelps' act was not seriously criminal.

III.

THE FINDING THAT DEFENDANT PHELPS WAS NOT ACTING WITHIN THE COURSE AND SCOPE OF HIS EMPLOYMENT AT THE TIME OF THE COLLISION IS NOT BASED ON SUBSTANTIAL EVIDENCE.

The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the trier of fact. *Tennant v. Peoria and P. U. Ry. Co.,* 321 U.S. 29, 64 S.Ct. 409.

It is appellant's position that there is no evidence in the record from which it can reasonably be inferred that Phelps consented to the driving of the vehicle beyond the turn-off point. The facts proven were that defendant Phelps picked up a hitchhiker; that the hitchhiker was a member of the Armed Services; that he was allowed to drive the car; that the car was driven to Barstow by said hitchhiker. Is it reasonable to infer from these facts that Phelps told the hitchhiker that he might drive the car to Barstow? The answer is "No".

At what point in the chain of events revealed by Phelps' testimony can it be said that he took himself beyond the scope of his office or employment? It must be conceded that he was within the scope of his employment at the time he turned the operation of the vehicle over to the hitchhiker. It is apparent from the comments of the trial judge (R. 101) that he concluded that the entrusting of the vehicle to the hitchhiker took Phelps outside the scope of his employment. That conclusion is contrary to the California law of respondeat superior and is error. See point

IV, infra. It must also be conceded that he was within the scope of his office or employment at the time he went to sleep. Certainly the act of going to sleep did not constitute a departure from his employment. *Gates v. Daley,* 54 Cal. App. 654 (202 P. 467). From that point on Phelps did not do anything which could be deemed a departure from his employment. The finding that Phelps was not acting within the scope of his office or employment is not only unsupported by substantial evidence, it is contrary to the only evidence on the issue.

IV.

THE CONDUCT OF THE HITCHHIKER IN DRIVING THE VEHICLE OF DEFENDANT UNITED STATES TO BARSTOW, CALIFORNIA IS CHARGEABLE TO DEFENDANT UNITED STATES.

(a) There is no evidence that defendant Phelps authorized the hitchhiker to drive the car beyond the point where defendant Phelps was to have turned off U. S. Highway 66 to return to George Air Force Base.

(b) The Court found upon uncontradicted evidence that defendant Phelps was in charge of a vehicle owned by defendant United States; that defendant Phelps was employed as a driver; and that he delegated the driving of the vehicle to another. The Court further found that after the other began to drive the car defendant Phelps went to sleep.

The conduct of the one to whom Phelps delegated his duties is chargeable to defendant United States.

California authorities are in accord with the general law of agency as enunciated in the Restatement of Agency, Section 241:

> "A master who has entrusted a servant with an instrumentality is subject to liability for harm caused by its negligent management by one to whom the servant entrusts its custody to serve the purposes of the master, if the servant should realize that there is an undue risk that such person will harm others by its management."

Comment (e) under that section sets forth one of the reasons for imposing liability on the master:

> "(e) Where servant remains in control. A servant, while remaining with the instrumentality, may surrender its immediate control to another, as where the driver of a truck permits a boy to drive it. Although such surrender is not negligent, the master remains subject to liability for any negligence of the employee in supervising the conduct of the other. However, in the absence of negligence by his servant, the master is not liable for any casual negligence of the other while under the supervision of the servant."

Comment (b) under Restatement of Agency, Section 81 (dealing with the authority of a servant to delegate his duties) further discusses the basis for the master's liability:

> "Comment (b) If a servant is authorized to substitute another servant of the principal, such substituted servant has power to subject the principal to liability as would any other of the prin-

cipal's servants. On the other hand, if the servant is not authorized to substitute another for himself, the principal is not subject to liability to third persons for the conduct of such person, unless the agent has been negligent in entrusting an instrumentality of the principal to such person or if, surrendering its immediate control to the other, he retains supervision over him and is negligent in his supervision (see § 241.)"

In *Gates v. Daley,* 54 C.A. 654, 655-656 (202 P. 467), a master was held liable for the negligence of one to whom his servant entrusted the operation of a vehicle. In that case the servant was employed to drive a truck and had no authority to engage another to operate it. While driving the truck in the regular course of his employment, he became fatigued, in order to rest, allowed his wife to drive it. The Court there held:

"The cases in which masters have been held liable for the negligence of assistants to their regularly employed servants, laying aside those instances in which the servants have engaged the assistants under an express authority conferred by the masters, seem to be divided into two classes: First, those cases in which the assistants committed the acts of negligence in the presence, and, therefore, impliedly, under the direction, of the servants; second, those in which the assistants, although being negligent while working out of the presence of the servants, were engaged in the rendition of services which they had been accustomed to perform at the servants' request for considerable periods of time, thus giving rise

to the view that the servants enjoyed an implied authority to engage them. A fair sample of the first class of cases is *Geiss v. Twin City Taxicab Co.,* 120 Minn. 368 (45 L.R.A. [N.S.] 382, 139 N.W. 611). After referring to several authorities on the subject the supreme court of Minnesota there said: 'We think they support the conclusion that the master is liable when the act is done in the presence of the servant and by his direction, or with his acquiescence, though the person doing the act is not a servant of the master and though the master has not authorized the servant to employ an assistant.' A case of the second class, on the facts stated, is found in the decision of our Supreme Court in *Bank of California v. Western Union Tel. Co.,* 52 Cal. 280, but the opinion there found is practically based upon *Althorf v. Wolfe,* 22 N.Y. 355, a case undoubtedly belonging in the first class. The present case, if the judgment against appellant is to stand, naturally falls in the same classification with *Althorf v. Wolfe* and with *Geiss v. Twin City Taxicab Co.,* supra. By its indorsement and adoption of the doctrine of *Althorf v. Wolfe,* our Supreme Court has aligned itself with the courts of those states whose decisions fall under the group to which that case belongs . . ."

Gates v. Daley, supra, has been consistently followed by the later cases in California. *Gibbons v. Naritoka,* 102 C.A. 669, 673 (283 P. 845); *Malloy v. Fong,* 37 C. 2d 356, 373 (231 P. 2d 241).

The fact that the delegation by Phelps of his duties was without authority is completely immaterial. In

Ruppe v. City of Los Angeles, 186 C. 400, 402 (199 P. 496), it was stated:

> "The rule is elementary that a master is responsible for the acts of his servant done in the course of his employment, even though those acts be unauthorized or contrary to the master's explicit instructions. As between the master and third persons, the act of the servant done as a part of the doing of that which he is employed to do are as if done by the master himself, and the question of authority as between the master and servant to do the particular acts is quite immaterial."

In *Wagnitz v. Scharetg,* 89 C.A. 511, 516-517 (265 P. 318), a case in which a chauffeur violated the express instructions of his employer, it was held:

> "It is well settled that: The owner's liability for the acts of a chauffeur 'is determined when a satisfactory conclusion is reached as to whether at the time in question the servant was acting within the scope of his employment; whether the acts which he was performing were expressly or impliedly authorized by his contract of employment . . . Where the servant acts within the general scope of his authority, notwithstanding the fact that he may be disregarding directions of the employer at the time, the employer may be held liable.' "

Conduct which a master has reason to expect will be done by his servant will be considered within the course and scope of the employment, even though unauthorized. Defendant United States should have

anticipated that Phelps would entrust the driving of the vehicle to another. The undisputed facts are that the motor pool at George Air Force Base was undermanned and that Phelps had driven long hours with little sleep. Section 229 of the Restatement of Agency contemplates such a factual situation.

> "§ 229. Kind of Conduct Within Scope of Employment.
>
> (1) To be within the scope of the employment, conduct must be of the same general nature as that authorized, or incidental to the conduct authorized.
>
> (2) In determining whether or not the conduct, although not authorized, is nevertheless so similar to or incidental to the conduct authorized as to be within the scope of employment, the following matters of fact are to be considered:
>
> (a) . . .
>
> (f) Whether or not the master has reason to expect that such an act will be done;"

The last sentence of Comment (a) to Section 229 suggests the answer to whether defendant United States should be held responsible for the conduct of the hitchhiker:

> "(a) . . . Since the phrase scope of the employment, is used for the purpose of determining the liability of the master for the conduct of servants, the ultimate question is whether or not it is just that the loss resulting from the servant's acts should be considered as one of the normal risks to be borne by the business in which the servant is employed."

The fact that defendant Phelps went to sleep after entrusting the vehicle to the hitchhiker does not relieve defendant United States from responsibility for the hitchhiker's conduct. It is appellant's position that Phelps, by going to sleep, acted negligently in failing to supervise the driving and that such negligence is that of Phelps' principal, defendant United States. Restatement of Agency, Section 81, Comment (b):

> "(b) If a servant is authorized to substitute another servant of the principal, such substituted servant has power to subject the principal to liability as would any other of the principal's servants. On the other hand, if the servant is not authorized to substitute another for himself, the principal is not subject to liability to third persons for the conduct of such person, unless the agent has been negligent in entrusting an instrumentality of the principal to such person or if, surendering its immediate control to the other, he retains supervision over him and is negligent in his supervision (see § 241)."

The only conclusion that can be reached on the present record is that the defendant United States was responsible for the conduct of the hitchhiker and that this being so, defendant Phelps never departed from the course and scope of his employment.

CONCLUSION.

Since the only issue is whether defendant Phelps was acting within the scope of his office or employ-

ment, and since the only evidence on the issue came from witnesses of the defendant United States and is uncontradicted and since that evidence clearly shows that defendant Phelps, at no time, voluntarily departed from the scope of his office or employment, this Court can, and should, determine the issue in appellants' favor and direct entry of judgment against the defendant United States and in favor of appellants.

Dated, San Francisco, California,
May 2, 1956.

Respectfully submitted,
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No. 14,926

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

PACIFIC FREIGHT LINES and SIDNEY S. RUSSELL,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal From the United States District Court for the Southern District of California, Central Division.

APPELLEE'S OPENING BRIEF.

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On Appeal From the United States District Court for the Southern District of California, Central Division.

APPELLEE'S OPENING BRIEF.

Jurisdictional Statement.

This suit was filed, and the District Court for the Southern District of California had jurisdiction thereof, under the Federal Tort Claims Act. (28 U. S. C. A. 1346(b).)

This Court has jurisdiction of the appeal from the District Court's Judgment under 28 U. S. C. A. 1291.

Statutes Involved.

The following portions of the Federal Tort Claims Act are applicable to the case:

"Section 1346. United States as defendant.

* * * * * * * *

"(b) Subject to the provisions of chapter 171 of this title, the district courts * * * shall have

exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

* * * * * * * *

"Section 2674. Liability of United States.

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punative damages.

* * * * * * * *

"Section 2671. Definitions.

As used in this chapter and sections 1346 (b) and 2401 (b) of this title, the term—

* * * * * * * *

"Employee of the government includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

"Acting within the scope of his office or employment, in the case of a member of the military or naval forces of the United States, means acting in line of duty."

Statement of the Case.

This is a tort claims action by plaintiffs for personal injuries and property damage arising out of a collision between plaintiff's truck and a Government vehicle. Judgment was in favor of the plaintiffs against the Government driver and in favor of the Government on the ground that the Government driver was not acting within the scope of his employment at the time of the collision.

The sole issue is whether the trial Court erred in finding that the Government driver was not acting within the scope of his employment at the time of the collision.

The facts relative to the issue of scope of employment are as follows:

At all times material, the defendant Phelps was an Airman in the United States Air Force stationed at George Air Force Base, Victorville, California, and was employed as a driver in the Motor Pool. [R. 14 (Finding of Fact I.)].

On February 4, 1954, the day before the accident, at approximately 3:00 P. M., the Air Force dispatched a Government car to Phelps and ordered him to drive an Officer from George Air Force Base to Los Angeles, California, and to immediately return to George Air Force Base. [R. 14 (Finding of Fact II), R. 37, 38, 43, 67 and 68].

Los Angeles, California, is located at a point which is approximately 115 miles west of George Air Force Base. [R. 14 (Finding of Fact III), R. 32 and 33].

At approximately 6:00 P. M., Phelps arrived in Los Angeles, left the Officer at the Biltmore Hotel, and began making the return trip to George Air Force Base. [R. 15 (Finding of Fact V), R. 63 and 69].

On the return trip Phelps stopped for dinner at approximately 7:00 P. M., then continued on the return trip again, and arrived in San Bernardino, California, at approximately 9:00 P. M. At San Bernardino he remained in a tavern until approximately midnight, during which time he drank a couple of beers. [R. 15 (Findings of Fact VI and VII), R. 69, 79 and 81].

San Bernardino, California, is located at a point between Los Angeles, California, and George Air Force Base. It is approximately 75 miles east of Los Angeles and 40 miles west of George Air Force Base. [R. 32 and 33].

After leaving the tavern at approximately midnight, Phelps started driving in a general easterly direction toward the Air Force Base, picked up a hitchhiker, asked the hitchhiker to drive the car, and then went to sleep. [R. 15 and 16 (Findings of Fact VIII, IX, X and XI), R. 80].

When Phelps awoke, it was 5:00 o'clock in the morning, and he discovered that the hitchhiker had driven him to Barstow, California. [R. 16 (Finding of Fact XII), R. 80 and 81].

Barstow, California, is located at a point which is approximately 35 miles east of George Air Force Base. [R. 16 (Finding of Fact XIII), R. 32 and 33].

After waking up in Barstow at approximately 5:00 A. M., Phelps started driving in a general westerly direction toward the Air Force Base, and after he had driven approximately 10 miles he collided with the truck at approximately 5:15 A. M. [R. 16 and 17 (Findings of Fact XIV, XV, and XVII) R. 29, 33, and 81].

Summary of Argument.

There is substantial evidence to support the Finding that the Government driver was not acting within the scope of his employment at the time of the collision.

The Court did not err in failing to conclude as a matter of law that the Government driver was acting within the scope of his employment at the time of the collision.

The conduct of the hitchhiker is not chargeable to the Government.

ARGUMENT.

I.

There Is Substantial Evidence to Support the Finding That the Government Driver Was Not Acting Within the Scope of His Employment at the Time of the Collision.

The record in this case discloses that the Government driver's authority was limited to driving from George Air Force Base to Los Angeles by the shortest and quickest route and to return immediately. This was a matter that was so clearly understood that it did not bear repeating each time a car was dispatched from the Motor Pool.

The trip to Los Angeles was in fact made in three hours, including a stop to check the oil. On the return trip the driver departed from his scope of employment when he arrived in San Bernardino.

There, instead of continuing on to the Air Force Base, as he knew he was required to do, he spent the evening in a tavern. Upon leaving at midnight, approximately two hours after he should have been back at the Base, he picked up a hitchhiker, and ended up at Barstow at five in the morning. For some unexplained reason it required five hours to travel the distance of 75 miles on open roads after midnight.

Whatever the explanation is, the sum and substance of the situation is very clear. Phelps had planned to go into San Bernardino that night after work for an evening's entertainment. Since it was already 9:00 o'clock when he reached San Bernardino, he decided to stay rather than go back to the Base and then come back into town. He had ample time to return the car before the accident occurred. The situation is therefore no different than if he had gone

back to the Base and then taken the car again without any authority whatsoever.

As pointed out on page 10 of Appellants' Brief, Section 228 of the Restatement of Agency enunciates the factors the Court should look to in determining scope of employment, which is a question of fact. They are three in number, namely, is the conduct of the kind the person is employed to perform, is it substantially within the time and space limits of his authority, and is it actuated, at least in part, by a purpose to serve the master?

Taking first the time and space limits of the authority, we have here a case wherein the conduct was so far removed in both time and space that this factor in and of itself would seem to compel the conclusion that the driver was not acting within the scope of his employment at the time of the collision. As to time, Phelps was employed to make a seven hour trip, including a stop for dinner. The collision ocurred seven hours after he should have returned. As to space limits, he was to go straight to Los Angeles and return. The accident happened 25 miles beyond the Air Force Base.

With respect to the kind of conduct involved, the only similarity is that Phelps was authorized to drive the car and was in fact driving it when it ran into the truck. If that were enough, every person employed to drive a car would always be within the scope of his employment when he is driving a car. Obviously the Court must look further than this, as indicated in Section 229 of the Restatement, which sets forth some of the factors used in determining the similarity of kind of conduct.

Based on these elements, the kind of conduct involved here is far different from that which was authorized. The driver was employed solely to go to Los Angeles and re-

turn. In fact he went to a tavern and then picked up a hitchhiker and went to Barstow. Is this a departure which is commonly taken by Air Force personnel, does the Air Force have reason to expect such conduct, is this a normal method of going to Los Angeles and returning by the shortest and quickest route, is it not seriously criminal to misuse Government property?

Finally with regard to the purpose of the conduct, there is, of course, some similarity in that the driver was required to return the car to the Base, and was attempting to do so when the accident happened. When viewed in light of the disparity of time, space and kind of conduct, however, it would seem that this similarity of purpose has little if any bearing on the question.

II.

The Court Did Not Err in Failing to Conclude as a Matter of Law That the Government Driver Was Acting Within the Scope of His Employment at the Time of the Collision.

As already indicated, the question of scope of employment is one of fact in the first instance. This is, of course, an ultimate fact based on many other factors such as the kind of conduct, the time and space limits, and the similarity of purpose. Once these factors are established, the question of scope of employment may be decided as a matter of law, if reasonable men could not differ as to the ultimate conclusion.

In this case it is submitted that if any conclusion can be reached as a matter of law, it is that the Government driver was not acting within the scope of his employment when the collision occurred.

As pointed out by the trial Court, a California case closely in point is *Gordoy v. Flaherty,* 9 Cal. 2d 716, 72 P. 2d 538 (1937). There the employee had gone three blocks out of his way and was held to be outside the scope of his employment.

Another case, decided on the basis of California law, and quite similar on its facts, is *Long v. United States,* 78 Fed. Supp. 35 (D. C. Cal. 1948). There the Government driver was ordered to drive an Officer from March Field, California, to El Monte, California, and return. He delivered the Officer at El Monte, went out of his way to Los Angeles on his return trip, and was returning to the Base from Los Angeles when he had the accident.

III.

The Conduct of the Hitchhiker Is Not Chargeable to the Government.

As we have already pointed out, the Government driver had departed from his employment when he reached San Bernardino, and should have returned to the Base before he started driving again. He was therefore outside the scope of employment when he later picked up the hitchhiker.

If by any stretch of the imagination he can be said to have returned to his employment at that time, he clearly departed again when he picked up the hitchhiker. This was an act which was not only unauthorized, but one which could not reasonably be expected.

If he had entrusted the driving of the car to some one else who had an accident on the way to Los Angeles, or on the return from Los Angeles to San Bernardino, it might be that the Government would be responsible on the ground that although there would be an unauthorized

delegation it was a delegation of otherwise authorized conduct. The case of *Gates v. Daley,* 54 Cal. App. 654, 202 Pac. 467 (1921), relied on by Appellants, says nothing more.

If the hitchhiker did anything which is material to the case at all, it is that he either took Phelps outside the scope of his employment or furthered his departure which had begun several hours before. Clearly the Government cannot be held responsible for the very thing which constitutes a defense to liability under the Tort Claims Act.

Conclusion.

There is substantial evidence to support the Finding that the Government driver was not acting within the scope of his employment at the time of the collision, and the Judgment of the trial court should therefore be affirmed.

Dated, Los Angeles, California, 1956.

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No. 14928.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JACK BENNY,

Appellant,

vs.

LOEW'S INCORPORATED, a corporation, and PATRICK HAMILTON,

Appellees.

COLUMBIA BROADCASTING SYSTEM, INC., and AMERICAN TOBACCO COMPANY,

Appellants,

vs.

LOEW'S INCORPORATED, a corporation, and PATRICK HAMILTON,

Appellees.

Appeals From the United States District Court for the Southern District of California, Central Division.

APPELLANTS' REPLY BRIEF.

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Appeals From the United States District Court for the Southern District of California, Central Division.

APPELLANTS' REPLY BRIEF.

I.

Appellees' Claim That a Parodist Has No Right of Fair Use Is Without Merit.

Throughout their brief, appellees reiterate in varying forms the question: "Why should the parodist, and only the parodist, stand in any better or different position before the law" than the serious dramatist or novelist whose use of copyrighted material would constitute infringement. (Appellees' Br. pp. 2, 3, 4, 34.) They argue that whenever one author has in any way used in his work more than an insubstantial proportion of the protectible mate-

rial contained in the work of another, there is actionable infringement wholly regardless of the purpose of such use, the manner in which the use is made, the necessity for the use in order to create a resultant new and totally different art form, or the extent to which the public interest would be injured were the use prohibited. The sole test, according to appellees, is whether the *amount* used would be considered "substantial" in the ordinary plagiarism case. Their position is clearly stated in their own words as follows:

> "Appellants have taken from the photoplay, not alone the general theme or idea, but the major sequences and details. . . . The parts so taken were substantial. . . . These principles make inescapable the conclusion that appellee's copyright was infringed by appellants. . . . The test of infringement *must in every case be the substantiality of the material taken,* not the mode or form in which the appropriations are used. . . . In other words, a parodized or burlesqued taking is treated no differently than any other appropriation." (Appellees' Br. pp. 8-15.)

And appellees flatly assert that the doctrine of fair use is not applicable to this case. (Appellees' Br. p. 15.)

The fact is, however, that the parodist does stand on a different footing from the serious dramatist or novelist. The unique requirements of the parodist's art confer on him the right to make a fair use of copyrighted material, and the interest of the general public in preserving this art form confers on it the right that such fair use be permitted. The failure to recognize these rights is the fundamental defect not only of appellees' brief but of the opinion below.

The doctrine of fair use is based squarely upon the constitutional mandate contained in Article I, Section 8, as uniformly construed by the courts. The copyright monopoly is granted solely to "promote the Progress of Science and the useful Arts," and "The primary object in conferring the monopoly lies in the general benefits derived by the public from the labors of authors." (*Fox Film v. Doyal,* 286 U. S. 123, 127.)* The doctrine of fair use exists as an integral part of the copyright law, because the public interest may demand, or even require, that certain uses be made of copyright materials, in which case the constitutional mandate would prevent the prohibition of such uses.**

Congress has not granted to authors the right to be free of "fair use" of their works; that is not one of the rights included in the copyright monopoly. When the statute grants a copyright to an author, it equivalently grants to the public at large the right to make such uses of that work as the public interest requires. As said by Ralph Shaw in his work, "Literary Property in the United States":

> "The differentiation between fair use and infringement is fundamentally a problem of balancing what the author must dedicate to society in return for his

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*Quoted in *United States v. Paramount Pictures Corp.,* 334 U. S. 131, 158, where the court says: "The copyright law, like the patent statutes makes reward to the owner a secondary consideration."

**Yankwich, "What is Fair Use?", 22 Univ. of Chicago L. Rev. 203 (1954); "Parody and Burlesque in the Law of Copyright", 33 Canadian Bar Rev. 1130, 1132 (1955). As Lord Ellenborough said in *Cary v. Kearsley,* 170 Eng. Rep. 679 (1802): "That part of the work of one author is found in another, is not of itself piracy or sufficient to support an action; a man may fairly adopt part of the work of another; *he may so make use of another's labours for the promotion of science and the benefit of the public.*"

> statutory copyright—which varies according to the nature of the works involved—against undue appropriation of what society has promised the author in terms of protection of his exclusive right to make merchandise of the product of his intellectual work. In its simplest terms, . . . fair use is all use dedicated to the public by the nature of statutory copyright. . . ." (P. 67.)

Because the basic tests of the extent to which use can be made of copyrighted material are founded upon the public interest, they must vary in relation to the varying factors which affect that interest. It follows that no artificial measurement of "substantiality" in the ordinary plagiarism sense can be applied as contended by appellees.

In the first place, their assertion that *any* "substantial" use is *ipso facto* an unfair use (Appellees' Br. pp. 18, 22) leaves no room for the doctrine at all. If the material used is in the public domain or is "insubstantial," then there is no limitation whatever upon its use by others and fair use is not involved. (Appellants' Br. p. 21, footnote.) The doctrine is only applicable where there has been a use of protectible material which would be substantial and an infringement except for the particular purpose or manner of use.

But, aside from that, the quantitative or qualitative measure of what is used is only *one* factor to be taken into consideration in weighing the primary demands of the public interest against the secondary object of protection to the author. In some instances the use of a comparatively minor though "substantial" part of the protectible material may be an infringement; in others, a very extensive use of such material will be fair. The difference in the result is not determined by either the amount

or the nature of the material taken; it is dependent upon the extent of the public interest in protecting or fostering the particular use which is made of that material.

Literary criticism is a case in point. For the purpose of criticism or review an author may give a full description of a copyrighted work, including its detailed story line or sequence of incidents, and make copious quotations therefrom. (Appellants' Br. pp. 24-25.) He may do so even though the criticism is wholly adverse, and thus one for which no consent could be "implied."* (*Hill v. Whalen,* 220 Fed. 359 (S. D. N. Y., 1914).) The reason for this extensive right of use is that literary criticism is an established art form which in the public interest ought to be protected and encouraged, and by the very nature of the form a critic ordinarily cannot perform his funtion in the way it ought to be performed without such use. Consequently, the law permits that use so long as it is within the limits of what is reasonably necessary to permit the critic to create his particular independent work.

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*A moment's reflection will dispel the appellees' notion (Appellees' Br. p. 18) that fair use is dependent upon the consent of the author or copyright proprietor. If that were so, then any author could prevent or limit any quotation or other use of his work for purposes of exemplification, criticism, review or otherwise, by a simple "notice of non-consent". But as Mr. Spring says in his book "Risks and Rights":

> "No copyright proprietor can destroy that right, or limit it *e.g.,* to a newspaper or periodical. Other book writers have the right of fair comment and criticism upon the ideas or literary merits of a copyrighted work, also the right to copy extracts thereof to buttress and illustrate or to corroborate that comment. And the use of quotations, to create background atmosphere or illustrate points, is a right of fair use that cannot be withheld by any copyright proprietor or publisher. . . . All the cases indicate that the definition of fair use and fair comment is for the court, *acting in the public's interest,* not for the publisher as the copyright proprietor." (P. 180.)

The same is true of the art form of parody and burlesque of particular works. Like literary criticism (and unlike any other art form of which we are aware) it is of its essential nature that it *must* make some use of a specific book, play, picture or other work of art.* Literary history shows that the more pointed and specific are the references to the "original," the more effective is the parody and the closer it approaches to the heights of great independent artistic creations. If, as we believe, the public interest is best served by the preservation of this ancient art form, the parodist must be allowed such use as will accomplish such preservation. Consequently, the test of infringement in this case cannot depend upon the establishment of any fine line between "substantiality" and "insubstantiality," in the plagiarism sense, or upon a strict qualitative or quantitative measurement of what is used. Rather, it must depend upon what is done with what is used—whether, on the one hand, the material is used only as the necessary ingredient for the independent creation of a bona fide parody or burlesque possessing the new and totally different literary characteristics of that

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*We have never contended, as appellees would have this court believe (Appellees' Br. pp. 36-38), that parody is entitled to use prior works because it is a branch of the art form of literary criticism. It is undeniable that most parodies are by their nature critiques of the works parodied as we pointed out (Appellants' Br. p. 14), but the two art forms are separate and distinct. However, there is a vital point of similarity in that both must make substantial use of prior works to live and flourish. Appellees apparently concede (though grudgingly) that right to criticism; parody is entitled to the same right for the same reason.

art form, or whether it is taken *animus furandi* for the purpose of reproducing the basic literary values of the original and thereby replacing that original before the public. As Judge Yankwich puts it:

> "The controlling question should be, not whether the parody or burlesque contains the skeleton or outline of the play or story it criticizes or ridicules, but whether it is true parody or a mere subterfuge for appropriating another person's intellectual creation. 'Fair use' thus becomes determinable in the light of all the valid judicially established criteria, including the result to be achieved, and in consonance with literary reality. For parody, under accepted definitions, is a type of composition which (1) seeks, in good faith, to criticize, caricature, mock, ridicule and distort the intellectual product of another, and (2) not to imitate or reproduce it as written, and (3) which, despite its own originality or merit, lacks the artistic and literary quality of the original. And, if a particular parody or burlesque achieves this, the fact that it is executed within the frame or around the outline of a serious work—the fact that there is (as there must be in any parody or burlesque) casual imitation—should not deprive it of standing as an independent literary or artistic creation in our courts. . . ." (Yankwich, "Parody and Burlesque in the Law of Copyright," 33 Canadian Bar Review 1130, 1152-1153.)

The fundamental difference between the art forms of the serious novelist and dramatist and the art form of the parodist which gives to the latter the right of fair use ordinarily denied to the former, lies in the fact that the art form of the parodist of the particular absolutely

requires the use of some other specific work of literature or art as its subject. Unless adequate use of that subject is made, there cannot be a parody of this type. Great novels or plays can be written without the slightest use of any other work; no parody of the particular can be. In the one case, public interest can be fully served by giving the copyright owner broad monopoly rights; in the case of parodies and of literary criticism, such interest can only be served by narrowing the monopoly scope sufficiently to permit the uses which are necessary to the existence of those useful arts.

Of course, the extent of the use is entitled to full consideration as one factor in determining the legitimacy of the result. There is bound to be a point at which the amount taken may be so great that the claim of burlesque or parody would become a subterfuge to disguise the reproduction of the substantial literary values of the original, untransmuted by creative literary effort. No public interest warrants such protection. But until such point is reached, we submit the parodist ought to have freedom to select those facets of the original which he desires to recall to his audience as the basis for exercising his own talent in this unique art form. The legitimate interests of authors and public alike will be irreparably harmed by the imposition of the strait jacket which appellees demand.

II.

Appellees' Claim That the Continued Exercise of the Parodist's Right of Fair Use Constitutes an Attempt to Change the Law Is Without Merit.

We believe this court will agree with the trial judge that this case is one of first impression.* It is not controlled by any breadth of general language in the Act, for such language is uniformly interpreted in the light of the constitutional purpose. (*Chamberlin v. Uris Sales Corp.,* 150 F. 2d 512 (2d Cir., 1945); *Martinetti v. Maguire,* 16 Fed. Cas. 920 (Cir. Ct. Cal., 1867).) The doctrine of fair use itself is not to be found in the language of the Act. It has been judicially declared as a necessary limitation of the copyright monopoly under the mandate of Article I, Section 8, of the Constitution.

Appellees argue (Resp. Br. 39) that custom cannot change the law. They thus industriously buffet a straw man. The issue is one of *interpreting* the law in the light of its necessary purpose "to promote Science and the useful Arts." The fact that both before and after the passage of this Act, and each Amendment thereto, the art of parody has continuously existed and flourished without challenge is potent evidence of the public interest in its

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*No purpose is to be served by further extended discussion of the English and American authorities analyzed at pages 35 to 43 of our opening brief. Appellees present no new cases. As we pointed out (Appellants' Br. pp. 40-41) the "mimicry" cases discussed by appellees (Appellees' Br. pp. 15-17) involved no literary parody or burlesque. The copyrighted work was there performed without change. They do illustrate, however, the extent to which courts have gone in permitting the use of "substantial" material even under such circumstances.

preservation. Examination of the examples and sources given in our opening brief at pages 14 to 21 will show the extensive use of otherwise protectible property in their creation.

None of the statutory revisions since 1790 purports to destroy or limit the legitimate right of parody. On the other hand, our courts have seldom, if ever, interpreted the Act to expand the copyright monopoly and to take away rights currently enjoyed by the public except when such a result was clearly intended. As appellees admit (Appellees' Br. p. 2), limitations on public rights to use literary material have resulted only from changes in the statute itself. In this case, as in those others, it is primarily for Congress to determine whether any such limitation is in the public interest.

III.

"Autolight" Is an Acknowledged Legitimate Parody or Burlesque, and Therefore Does Not Infringe "Gaslight."

The proper test of infringement in this case is, as we have shown, to determine whether the work in question used appellees' material only as the necessary ingredient for the independent creation of a bona fide parody or burlesque possessing the new and totally different literary characteristics of that art form, or whether such material was used *animus furandi* for the purpose of reproducing the basic literary values of the original and thereby replacing the original before the public. Since the court below erroneously failed to apply this test, its findings of

fact as to copying (Appellees' Br. p. 1) are not pertinent to the issue actually involved. Moreover, where, as here, the facts are not in dispute and the works involved are available for examination by the Court of Appeals, the findings below do not have the conclusive effect asserted (pp. 1, 8) by appellees. *Soy Food Mills v. Pillsbury Mills,* 161 F. 2d 22, 25 (7th Cir., 1947); cert. denied 332 U. S. 766 (1947).

There can be no doubt but that "Autolight" is a bona fide and legitimate parody or burlesque. Appellees made no attempt to prove that "Autolight" is a subterfuge. Indeed they apparently do not challenge its legitimacy.

As pointed out in our opening brief (pp. 43-46), "Autolight" was a new and independent literary work. Every element of "'Gaslight" used in "Autolight" was changed, inverted and transformed into a diametrically opposite set of literary values. Everything that was serious, tense and dramatic in the original became hilarious in the burlesque. The leading characters were mocked in an exaggerated and ludicrous fashion. This is the essence of parody and burlesque.

In burlesqueing "Gaslight," the authors of "Autolight" necessarily had to use recognizable elements of "Gaslight," for otherwise the burlesque had no point. They chose to use the basic plot and the outline of a few key incidents on which to focus their talents in this different field. But their use was no greater than was reasonably necessary to accomplish their proper purpose, and the few bare bones they used, they clothed with their own entirely

different literary treatment, expression and development. The resulting burlesque in no way supersedes or substitutes for the motion picture. It is, in short, only a fair use of the copyrighted material in "Gaslight."

The way to determine whether the television program "Autolight" is merely a depiction of the basic literary values of the motion picture "Gaslight," is to view each production as it appeared to its respective audience. Since both works are to be made available to the court for examination in that form, there is no necessity to comment at length on the distorted impression which may be conveyed by the appendices to appellees' brief. It is sufficient to point out that those appendices, bearing no real resemblance to the motion picture or television program, are typical of the kind of "analysis" by lineal dissection and rearrangement which has been uniformly condemned by the courts. (*Nichols v. Universal Pictures Corp.,* 45 F. 2d 119 (2d Cir., 1930); *Cain v. Universal Pictures Co.,* 47 F. Supp. 1013 (S. D. Cal., 1942); *Frankel v. Irwin,* 34 F. 2d 142, 144 (S. D. N. Y., 1918); and *Christie v. Harris,* 47 F. Supp. 39 (S. D. N. Y., 1942), aff'd 154 F. 2d 827 (2d Cir., 1946), cert. denied 329 U. S. 734 (1946).)

We think that consideration of the works as publicly presented will make it clear beyond doubt that "Autolight" and "Gaslight" are separate and independent creations, each having its own literary merit. "Gaslight" is a fine motion picture. "Autolight" is a bona fide parody, just as much as were the parodies of Fielding, Thackeray,

Burnand, Harte, Weber and Fields, and scores of others in the earlier days, and of Pain, Benchley, Thurber, Corey Ford, and the other great modern exponents of the art. If "Autolight" has no independent right to existence, then neither have the parodies of those famous and respected authors, and from this date a great literary tradition must vanish. We submit that American copyright law does not require that result.

Respectfully submitted,

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May, 1956.

Nos. 14930-31-32

United States
Court of Appeals
for the Ninth Circuit

No. 14930
RAMESON BROTHERS, etc., et al., Appellants,
vs.
GEORGE T. GOGGIN, Trustee in Bankruptcy, etc., et al., Appellees.

No. 14931
FREDERICK M. RAMESON, Bankrupt, Appellant,
vs.
GEORGE T. GOGGIN, as Trustee in Bankruptcy, etc., et al., Appellees.

No. 14932
WILLIAM W. RAMESON, Bankrupt, Appellant,
vs.
GEORGE T. GOGGIN, as Trustee in Bankruptcy, etc., et al., Appellees.

Transcript of Record

Appeals from the United States District Court for the Southern District of California, Central Division

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif. —1-18-56

Nos. 14930-31-32

United States
Court of Appeals
for the Ninth Circuit

No. 14930

RAMESON BROTHERS, etc., et al., Appellants,

vs.

GEORGE T. GOGGIN, Trustee in Bankruptcy, etc., et al., Appellees.

No. 14931

FREDERICK M. RAMESON, Bankrupt, Appellant,

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Transcript of Record

Appeals from the United States District Court for the Southern District of California, Central Division

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No. 14930

United States
Court of Appeals
for the Ninth Circuit

RAMESON BROTHERS, a co-partnership, composed of William W. Rameson and Frederick M. Rameson, bankrupt, and WILLIAM W. RAMESON and FREDERICK M. RAMESON, co-partners, Appellant,

vs.

GEORGE T. GOGGIN, as Trustee in Bankruptcy of the Estate of Rameson Brothers, a co-partnership, composed of William W. Rameson and Frederick M. Rameson, Bankrupt, and SOL JARMULOWSKY, Appellees.

Transcript of Record

Appeal from the United States District Court for the Southern District of California, Central Division

NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

PAUL TAYLOR,
DAVID SOSSON,
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Los Angeles 14, California,

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For Appellee George T. Goggin, etc.:

SLANE, MANTALICA & DAVIS,
LOUIS N. MANTALICA,
FRANK BARCLAY,
LEWIS C. TEEGARDEN,
257 S. Spring Street,
Los Angeles 12, California.

For Appellee Sol Jarmulowsky:

LOUIS MOST,
ROBERT N. RICHLAND,
JACK LINCOLN,
328 S. Beverly Drive,
Beverly Hills, California. [1*]

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In the District Court of the United States, Southern District of California, Central Division

In Bankruptcy—No. 55062-BH

In the Matter of RAMESON BROTHERS, a copartnership composed of William W. Rameson and Frederick M. Rameson, Alleged Bankrupt.

CREDITORS' PETITION

To the Honorable Judge of the District Court of the United States, for the Southern District of California, Central Division:

The petition of Herco Pipe & Supply Company, Inc. of West Los Angeles, a corporation, Lord-Babcock, Inc., a corporation, and Back Panel Company, a corporation, respectfully alleges:

I.

That your petitioners are informed and believe and therefore allege that Rameson Brothers is a copartnership, composed of William W. Rameson and Frederick M. Rameson.

II.

That Rameson Brothers, a copartnership composed of William W. Rameson and Frederick M. Rameson, has had its principal place of business at 1860 Franklin Avenue, Santa Monica, California, within the above judicial district for a longer period [2] of the six months immediately preceding the

filing of this petition than in any other judicial district.

III.

That Rameson Brothers, a copartnership composed of William W. Rameson and Frederick M. Rameson, owes debts in the amount of over $1,000 and is not a wage-earner or a farmer.

IV.

That your petitioners are creditors of said Rameson Brothers, a copartnership composed of William W. Rameson and Frederick M. Rameson, having provable claims against it fixed as to liability and liquidated in amount, amounting in the aggregate in excess of the value of securities held by them, to $500. The nature and amount of your petitioners' claims are as follows:

A. The alleged bankrupt is indebted to your petitioner, Herco Pipe & Supply Company, Inc. of West Los Angeles, for goods sold and delivered by the said Herco Pipe & Supply Company, Inc. of West Los Angeles to the alleged bankrupt; that your petitioner, Herco Pipe & Supply Company, Inc. of West Los Angeles, does not have security for its debt upon the property of the alleged bankrupt and that its securities, if any, are upon the property of persons other than the alleged bankrupt, and that the debt due said petitioner from the alleged bankrupt exceeds the amount of such securities, if any, by an amount in excess of $500.

B. The alleged bankrupt is indebted to your petitioner, Lord-Babcock, Inc., for goods sold and

delivered by the said Lord-Babcock, Inc. to the alleged bankrupt; that your petitioner, Lord-Babcock, Inc., does not have security for its debt upon the property of the alleged bankrupt and that its securities, if any, are upon the property of persons other than the alleged bankrupt, and that the debt due said petitioner from the [3] alleged bankrupt exceeds the amount of such securities, if any, by an amount in excess of $500.

C. The alleged bankrupt is indebted to your petitioner, Back Panel Company, in the sum of $591.50 for goods sold and delivered by the said Back Panel Company to the alleged bankrupt.

V.

That within four months next preceding the filing of this petition, the said Rameson Brothers, a copartnership composed of William W. Rameson and Frederick M. Rameson, did, on the 30th day of September, 1952, make a general assignment for the benefit of its creditors to Building Materials Dealers' Credit Association, J. M. Dean, agent for said association.

VI.

That the law firm of Slane, Mantalica & Davis are the attorneys for your petitioners and each of them and have been duly authorized by your petitioners and each of them to sign and verify the within petition.

Wherefore, your petitioners pray that service of this petition, with a subpoena, may be made upon

said Rameson Brothers, a copartnership composed of William W. Rameson and Frederick M. Rameson, as provided in the Bankruptcy Act, and that it may be adjudged by this Court to be a bankrupt within the purview of said act.

SLANE, MANTALICA & DAVIS,

/s/ By LLOYD TEVIS.

Attorneys for Petitioning Creditors [4]

Duly Verified. [5]

[Endorsed]: Filed October 7, 1952.

[Title of District Court and Cause No. 55062.]

ORDER OF GENERAL REFERENCE

At Los Angeles, California, in said district on the 7th day of October, 1952;

Whereas, a petition was filed in this court on the 7th day of October, 1952, against Rameson Brothers, a copartnership, alleged bankrupt above named, praying that it be adjudged a bankrupt under the Act of Congress relating to bankruptcy, and good cause now appearing therefor;

It is ordered that the above-entitled proceeding be, and it hereby is, referred to Hugh L. Dickson, Esq., one of the referees in bankruptcy of this court, to take such further proceedings therein as are required and permitted by said Act, and that the

said Rameson Brothers, a copartnership composed of William W. Rameson and Frederick M. Rameson shall henceforth attend before said referee and submit to such orders as may be made by him or by a judge of this court relating to said bankruptcy.

/s/ LEON R. YANKWICH,
District Judge [6]

[Endorsed]: Filed October 7, 1952.

[Title of District Court and Cause No. 55062.]

CONSENT TO ADJUDICATION

The undersigned, Rameson Brothers, a copartnership composed of William W. Rameson and Frederick M. Rameson, does hereby consent to the entry of an order adjudicating it as a bankrupt.

Dated: October 14, 1952.

RAMESON BROTHERS,

/s/ By WILLIAM W. RAMESON,
Partner

/s/ By FREDERICK M. RAMESON,
Partner

Approved by:

/s/ PAUL TAYLOR,
Attorney for Bankrupt. [7]

[Endorsed]: Filed October 17, 1952.

[Title of District Court and Cause No. 55062.]

ADJUDICATION OF BANKRUPTCY

At Los Angeles, in said District, on the 16th day of October, 1952.

The petition of Herco Pipe & Supply Company, Inc. of West Los Angeles, a corporation, Lord-Babcock, Inc., a corporation, and Back Panel Company, a corporation, filed on the 7th day of October, 1952, that Rameson Brothers, a copartnership composed of William W. Rameson and Frederick M. Rameson, be adjudged a bankrupt under the Act of Congress relating to bankruptcy, and the alleged bankrupt having consented to adjudication; and there being no opposing interest;

It is adjudged that the said Rameson Brothers, a copartnership composed of William W. Rameson and Frederick M. Rameson, is a bankrupt under the Act of Congress relating to bankruptcy.

/s/ HUGH L. DICKSON,
Referee in Bankruptcy [8]

[Endorsed]: Filed October 17, 1952.

[Title of District Court and Cause No. 55062.]

ANSWER OF BANKRUPT

Now comes Rameson Brothers, a copartnership, and answering the involuntary petition in bankruptcy filed by its certain creditors makes return and answers the said petition thus:

1. Bankrupt's place of business is 1860 Franklin

Street, Santa Monica, California, within the above judicial district.

2. Bankrupt owes debts and is willing to surrender all its property for the benefit of its creditors, except such as is exempt by law, and desires to obtain the benefit of the Act of Congress relating to bankruptcy.

3. The schedule hereto annexed, marked Schedule A, and verified by the Bankrupt's oath, contains a full and true statement of all its debts, and, so far as it is possible to ascertain, the names and places of residence of its creditors, and such further statements concerning said debts as are required by the provisions of said Act.

4. The schedule hereto annexed, marked Schedule B, and verified by the Bankrupt's oath, contains an accurate inventory of all its property, real and personal, and such further statements concerning said property as are required by the provisions of said Act.

5. The Bankrupt hereby admits all the allegations in the petition of bankruptcy hereinbefore filed by Bankrupt's creditors.

Wherefore, Bankrupt prays that it may be discharged as a Bankrupt within the purview of said Act.

RAMESON BROTHERS,
a Copartnership
/s/ By WILLIAM W. RAMESON,
Copartner
/s/ By FREDERICK M. RAMESON,
Copartner

PAUL TAYLOR and DAVID SOSSON,
/s/ By PAUL TAYLOR,

Attorneys for Bankrupt [9]

Duly Verified. [10]

[Endorsed]: Filed November 20, 1952.

[Title of District Court and Cause No. 55062.]

ORDER APPROVING TRUSTEE'S BOND

At Los Angeles, in said district, on the 10 day of December, 1952.

The above named Rameson Brothers, having been duly adjudged a bankrupt on a petition filed by (or against) him on the 16th day of October, 1952; and George T. Goggin, of Los Angeles, in said district, having been duly appointed trustee of the estate of said bankrupt, and having duly qualified by giving a bond with sufficient sureties for the faithful performance of his official duties in the amount fixed by the order of this court, viz., Fifty Thousand and no/100 dollars ($50,000.00);

It Is Ordered that the said bond be, and it hereby is, approved.

/s/ HUGH L. DICKSON,
Referee in Bankruptcy [144]

[Endorsed]: Filed December 10, 1952.

[Title of District Court and Cause No. 55062.]

ORDER FIXING TIME FOR FILING OBJECTIONS TO DISCHARGE

At Los Angeles, in said district, on the 3rd day of February, 1953.

It appearing that the above named bankrupt has been adjudged a bankrupt and has been duly examined at a meeting of creditors as required by the Act of Congress relating to bankruptcy;

It Is Ordered that the 17 day of March, 1953, be, and it hereby is, fixed as the last day for the filing of objections to the discharge of said bankrupt.

/s/ HUGH L. DICKSON,
Referee in Bankruptcy [145]

[Title of District Court and Cause No. 55062.]

PETITION AND ORDER TO EXTEND TIME TO OBJECT TO DISCHARGE

To the Honorable Hugh L. Dickson, Referee in Bankruptcy:

The verified petition of Slane, Mantalica & Davis, by Lloyd Tevis, respectfully represents:

I.

That they are the duly appointed attorneys for the trustee in the within bankrupt estate.

II.

That they are examining into certain acts of the bankrupt relative to filing objections to their discharge, but will not have the same completed prior to the last date for filing such objections, namely, the 17th day of March, 1953.

Wherefore, your petitioners pray that the last date to file objections to the discharge of the within bankrupt be extended to and including Friday, May 15, 1953.

Dated: March 12, 1953.

SLANE, MANTALICA & DAVIS,
/s/ By LLOYD TEVIS,
Attorneys for Trustee [146]

ORDER

It Is So Ordered.

Dated: March 13, 1953.

/s/ HUGH L. DICKSON,
Referee in Bankruptcy [147]

Duly Verified. [147-A]

[Endorsed]: Filed March 13, 1953.

[Title of District Court and Cause No. 55062.]

PETITION AND ORDER TO EXTEND TIME TO OBJECT TO DISCHARGE

To the Honorable Hugh L. Dickson, Referee in Bankruptcy:

The verified petition of Slane, Mantalica & Davis, by Lloyd Tevis, respectfully represents:

I.

That they are the duly appointed attorneys for the trustee in the within bankrupt estate.

II.

That they are examining into certain acts of the bankrupt relative to filing objections to their discharge, but will not have the same completed prior to the last date for filing such objections, namely, the 15th day of May, 1953.

Wherefore, your petitioners pray that the last date to file objections to the discharge of the within bankrupt be extended to and including July 15, 1953.

Dated: May 12, 1953.

SLANE, MANTALICA & DAVIS,

/s/ By LLOYD TEVIS,

Attorneys for Trustee [148]

ORDER

It Is So Ordered.

Dated: May 13, 1953.

/s/ HUGH L. DICKSON,
Referee in Bankruptcy [149]

Duly Verified. [149-A]

[Endorsed]: Filed May 13, 1953.

[Title of District Court and Cause No. 55062.]

PETITION AND ORDER TO EXTEND TIME TO OBJECT TO DISCHARGE

To the Honorable Hugh L. Dickson, Referee in Bankruptcy:

The verified petition of Slane, Mantalica & Davis, by Lloyd Tevis, respectfully represents:

I.

That they are the duly appointed attorneys for the trustee in the within bankrupt estate.

II.

That they are examining into certain acts of the bankrupt relative to filing objections to their discharge, but will not have the same completed prior to the last date for filing such objections, namely, the 15th day of July, 1953.

Wherefore, your petitioners pray that the last

date to file objections to the discharge of the within bankrupt be extended to and including September 15, 1953.

Dated: July 14, 1953.

SLANE, MANTALICA & DAVIS,
/s/ By LLOYD TEVIS,
Attorneys for Trustee [150]

ORDER

It Is So Ordered.

Dated: July 15, 1953.

/s/ HUGH L. DICKSON,
Referee in Bankruptcy [151]

Duly Verified. [151-A]

[Endorsed]: Filed July 15, 1953.

[Title of District Court and Cause No. 55062.]

PETITION AND ORDER TO EXTEND TIME TO OBJECT TO DISCHARGE

To the Honorable Hugh L. Dickson, Referee in Bankruptcy:

The verified petition of Slane, Mantalica & Davis, by Lloyd Tevis, respectfully represents:

I.

That they are the duly appointed attorneys for the trustee in the within bankrupt estate.

II.

That they are examining into certain acts of the bankrupt relative to filing objections to their discharge, but will not have the same completed prior to the last date for filing such objections, namely, the 15th day of September, 1953.

Wherefore, your petitioners pray that the last date to file objections to the discharge of the within bankrupt be extended to and including October 15, 1953.

Dated: September 11, 1953.

SLANE, MANTALICA & DAVIS,

/s/ By LLOYD TEVIS,

Attorneys for Trustee [152]

ORDER

It Is So Ordered.

Dated: September 15, 1953.

/s/ HUGH L. DICKSON,
Referee in Bankruptcy [153]

Duly Verified. [153-A]

[Endorsed]: Filed September 15, 1953.

[Title of District Court and Cause No. 55062.]

PETITION AND ORDER TO EXTEND TIME TO OBJECT TO DISCHARGE

To the Honorable Hugh L. Dickson, Referee in Bankruptcy:

The verified petition of Slane, Mantalica & Davis, by Louis N. Mantalica, respectfully represents:

I.

That they are the duly appointed attorneys for the trustee in the within bankrupt estate.

II.

That they are examining into certain acts of the bankrupt relative to filing objections to their discharge, but will not have the same completed prior to the last date for filing such objections, namely the 15th day of October, 1953.

Wherefore, your petitioners pray that the last date to file objections to the discharge of the within bankrupt be extended to and including November 17, 1953.

Dated: October 15, 1953.

SLANE, MANTALICA & DAVIS,

/s/ By LOUIS N. MANTALICA,

Attorneys for Trustee [154]

ORDER

It Is So Ordered.

Dated: October....., 1953.

....,
Hugh L. Dickson, Referee in
Bankruptcy [155]

Duly Verified. [155-A]

[Endorsed]: Filed October 15, 1953.

[Title of District Court and Cause No. 55062.]

SUPPLEMENTAL CERTIFICATE ON REVIEW

To the Honorable Ben Harrison, Judge of the United States District Court for the Southern District of California:

I, Joseph J. Rifkind, Referee in Bankruptcy, in charge of and to whom the above entitled matter has been referred after the death of Hugh L. Dickson, to whom the matter was originally referred in compliance with the order of Honorable Ben Harrison, United States District Court, do hereby transmit to said Honorable Ben Harrison, and do certify this Supplemental Certificate on Review, by attaching to this Certificate the following:

1. Order Approving Trustee's Bond dated Dec. 10, 1952;

2. Order Fixing Time for Filing Objections to Discharge dated March 17, 1953;

3. Petition and Order to Extend Time to Object to Discharge filed March 13, 1953;

4. Petition and Order to Extend Time to Object to Discharge filed May 13, 1953;

5. Petition and Order to Extend Time to Object to Discharge filed July 15, 1953; [156]

6. Petition and Order to Extend Time to Object to Discharge filed September 15, 1953, and

7. Petition and Order to Extend Time to Object to Discharge filed October 15, 1953.

Dated this 28 day of October, 1955.

/s/ JOSEPH J. RIFKIND,
Referee in Bankruptcy [157]

[Endorsed]: Filed October 28, 1955.

[Title of District Court and Cause No. 55062.]

SPECIFICATION OF OBJECTIONS TO DISCHARGE

To the Honorable Hugh L. Dickson, Referee in Bankruptcy:

George T. Goggin of Los Angeles, in the County of Los Angeles, State of California, the Trustee of the estates of the above-named bankrupts, having examined into the acts and conduct of said bankrupts and being satisfied that probable grounds exist for the denial of the discharge of said bankrupts and that the public interest so warrants, does hereby oppose the granting to said bankrupts of a dis-

charge from their debts, and specifies the following as grounds of objection:

I.

That Rameson Brothers, a copartnership composed of [158] William W. Rameson and Frederick M. Rameson, one of the above-named bankrupts, has failed to explain satisfactorily the deficiency of its assets to meet its liabilities, in that when Frederick M. Rameson, one of the copartners of the bankrupt partnership, was interrogated upon his examination in this proceeding, held on the 7th day of January, 1953, as to why the bankrupt partnership suffered serious financial losses, his answer was that he could not account for it.

That Rameson Brothers, a copartnership composed of William W. Rameson and Frederick M. Rameson, one of the above-named bankrupts, has failed to explain satisfactorily the deficiency of its assets to meet its liabilities, in that when Willam W. Rameson, one of the copartners of the bankrupt partnership, was interrogated upon his examination in this proceeding, held on the 7th day of January, 1953, as to why the bankrupt partnership suffered serious financial losses, his answer was that he could not account for it.

II.

That the bankrupt, Frederick M. Rameson, has failed to explain satisfactorily the deficiency of his assets to meet his liabilities, in that when he was interrogated upon his examination in this proceeding, held on the 7th day of January, 1953, as to

why he suffered serious financial losses, his answer was that he could not account for it.

III.

That the bankrupt, William W. Rameson, has failed to explain satisfactorily the deficiency of his assets to meet his liabilities, in that when he was interrogated upon his examination in this proceeding, held on the 7th day of January, 1953, as to why he suffered serious financial losses, his answer was that he [159] could not account for it.

/s/ GEORGE T. GOGGIN,
Trustee

SLANE, MANTALICA & DAVIS,
/s/ By LLOYD TEVIS,
Attorneys for Trustee [160]

Duly Verified. [161]

[Endorsed]: Filed November 17, 1953.

[Title of District Court and Cause No. 55062.]

SPECIFICATIONS OF OBJECTIONS TO DISCHARGE

Sol Jarmulowsky, of Los Angeles, in the County of Los Angeles, State of California, a Creditor of the above named bankrupt, having examined into the acts and conduct of said bankrupt, and being satisfied that probable grounds exist for the denial of the discharge of said bankrupt, and that the

public interest so warrants, does hereby oppose the granting to said bankrupt of a discharge from his debts, and specifies the following ground of objections:

(1) That the bankrupt did fail to keep proper records, books of account and records, from which his financial condition and business transactions might be ascertained; in that the said bankrupt caused the accounts and checks to be written up to show that the sub-contractors were paid; and checks were made out accordingly, but never mailed; the books maintained by the bankrupt were kept under the direction of the said bankrupt and entries were made purportedly to show that progress payments were being made to sub-contractors, when in truth and in fact, no such [162] progress payments were or have been made.

(2) The undersigned, creditor, upon information and belief alleges that the bankrupt did make and publish materially false statements in writing, respecting the financial condition of the bankrupt, in that said bankrupt did cause entries to be made purportedly showing that sub-contractors had been paid and progress payments had been made by the bankrupt, when in truth and in fact no such progress payments had been made to material men, subcontractors or laborers.

/s/ SOL JARMULOWSKY,
Creditor

Duly Verified. [163]

[Endorsed]: Filed March 17, 1953.

[Title of District Court and Cause No. 55062.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The trustee in the above entitled bankruptcy having duly filed his Specifications of Objections to Discharge with this Court based upon Section 14C(7) of the Bankruptcy Act, and Sol Jarmulowsky having duly filed his Specifications of Objections to Discharge with said Court based upon Section 14C(2) of the Bankruptcy Act, notice of the hearing whereof, was duly given the bankrupt and to said objectors; and a hearing upon the issues involved having been had before me at 2:00 o'clock p.m. on the 31st day of August, 1954, whereat I received and heard the proofs of the parties in interest, and due consideration having been had thereon, I find as

Findings of Fact

A. Trustee's Objection.

Upon reading and review of portions of the transcript of the Section 21a examination of Frederick M. Rameson and William W. Rameson, partners in the above entitled partnership, I find that they have failed to offer any explanation for the deficiency of assets of said partnership to meet its liabilities. [164]

B. Creditors' Objection.

1. Said partnership did follow and utilize the

accounting and bookkeeping practices hereinafter enumerated.

2. Said firm frequently prepared checks with which to pay creditors supplying materials in advance of their actual negotiation.

3. Said firm marked bills and invoices as paid when said checks were prepared, and not at the time of negotiation.

4. Said firm did frequently give checks to creditors in payment for materials supplied with an oral agreement between said parties not to cash said checks until further notice from Rameson Brothers.

5. Said firm marked bills and invoices as paid when said checks were given out and not when actually cashed and/or negotiated.

6. Said firm was behind in posting entries in its books of accounts or records frequently as long as two or three months.

7. The books of account or records of said firm did not truly reflect its financial condition and business transactions because bills and invoices were marked paid before actual payment and because said firm was behind in posting entries in its books of account or records; and I further find as

Conclusions of Law

A. Trustee's Objection.

1. The bankrupt has failed to explain satisfactorily the deficiency of assets of said partnership to meet its liabilities.

2. Because of this failure to explain, the application of the bankrupt for its discharge should be denied.

3. That an order to that effect should be entered.

B. Creditors' Objection.

1. That the bankrupt has failed to keep books of [165] account or records from which its financial condition and business transactions might be ascertained.

2. That the application of the bankrupt for its discharge should be denied.

3. That an order to that effect should be entered.

Dated: September 15, 1954.

/s/ HUGH L. DICKSON,
Referee in Bankruptcy [166]

Affidavit of Service by Mail attached. [167]

[Endorsed]: Filed September 15, 1954.

[Title of District Court and Cause No. 55062.]

ORDER DENYING DISCHARGE

Rameson Brothers, a copartnership composed of William W. Rameson and Frederick M. Rameson, having been duly adjudicated bankrupt in this Court, and specifications of objections to its discharge having been duly filed by George T. Goggin, trustee in the above named bankruptcy, and by Sol Jarmulowsky, notice of the hearing whereof, was

duly given to the bankrupt and to said objectors; and said hearing having been duly had thereon, and the proofs of the parties having been duly made at said hearing by Slane, Mantalica & Davis appearing as attorneys for the objecting trustee, Louis Most, Robert N. Richland and Jack Lincoln appearing as attorneys for the objecting creditor, and Paul Taylor appearing as attorney for the bankrupt; and the Court having thereupon filed its findings of fact and conclusions of law,

It Is Now Ordered that the application of the bankrupt for its discharge, be and the same is hereby denied on two distinct grounds, namely those set forth in Sections 14C(2) and 14C(7) of [168] the Bankruptcy Act.

Dated: September 15, 1954.

/s/ HUGH L. DICKSON,
Referee in Bankruptcy [169]

Affidavit of Service by Mail attached. [170]

[Endorsed]: Filed September 15, 1954.

[Title of District Court and Cause No. 55062.]

PETITION FOR REVIEW OF REFEREE'S ORDER

The Petition of Rameson Brothers, a copartnership composed of William W. Rameson and Frederick M. Rameson, respectfully shows:

That in the course of the proceedings herein on

August 31, 1954, the certain specifications of objection to your petitioner's discharge in bankruptcy, theretofore filed by George T. Goggins, Trustee in Bankruptcy, and one Sol Jarmulowsky, a creditor, came on for hearing before the Honorable Hugh L. Dickson, Referee in Bankruptcy, and following same an order was made and entered by said Referee on September 15, 1954, denying petitioner's discharge in bankruptcy;

That said order was and is erroneous in the following particulars:

1. The written specifications of objection to petitioner's discharge in bankruptcy filed by the Trustee do not set forth grounds in accordance with any of the provisions of Section 14, and more particularly Section 14c (7) of the [171] Bankruptcy Act, for a denial of petitioner's discharge;

2. The evidence adduced at the hearing in support of the Trustee's specifications of objection neither directly nor by inference reasonably established that your petitioner had failed to explain satisfactorily any losses of assets, or deficiency of assets to meet its liabilities;

3. The findings of the Referee and his order denying the discharge are unsupported by the evidence;

4. The written specifications of objection to your petitioner's discharge, of one, Sol Jarmulowsky, a creditor, were adopted on oral motion of the Trustee in the within case on August 31, 1954, as the Trustee's additional specifications of objection

to your petitioner's discharge, without the assent of said creditor or his counsel, and said specifications do not set forth any grounds in accordance with the provisions of Section 14, and more particularly Section 14c (2) of the Bankruptcy Act, warranting a denial of your petitioner's discharge;

5. The evidence adduced at the hearing on the specifications of objection of said Sol Jarmulowsky did not reasonably establish that your petitioner failed to keep books of account or records from which its financial condition and business transactions might be ascertained, rather the system of check writing referred to therein, and concerning which evidence was given, established an anticipatory manner of paying bills in consonance with its books of account and records and from which its financial condition and business transactions could most readily be ascertained.

6. The Referee at the said hearing on August 31, 1954, permitted wholly immaterial issues, concerning certain specific realty dealings of your petitioner, a bankrupt copartnership, to be introduced in evidence, despite the fact that no reference [172] thereto was contained in the specifications of objection of either the Trustee or of said creditor, and no grounds for the denial of your petitioner's discharge in bankruptcy were reasonably established thereby in accordance with any of the provisions of Section 14 of the Bankruptcy Act.

7. The comments of the Reference throughout the hearing indicate a wholly hostile attitude to-

ward your petitioner, and explain to a degree the error of his resulting order. His repeated references to what he termed 'fraud', and 'going to the public for credit', as having been committed by your petitioner, when in fact no 'fraud' nor 'going to the public for credit' was charged in the specifications of objection of either the Trustee or the objecting creditor, find no support in the evidence whatsoever. This is classically indicative of the ground upon which he in fact based his order denying your petitioner's discharge, and is contrary to the findings of fact and conclusions of law made by him herein.

Wherefore, your petitioner, Rameson Brothers, a copartnership composed of William W. Rameson and Frederick M. Rameson, being aggrieved by said order, prays that the same may be reviewed by a judge of this court, as provided by the Bankruptcy Act.

Dated: September 21, 1954.

PAUL TAYLOR and
DAVID SOSSON,

/s/ DAVID SOSSON,

Attorneys for Bankrupt [173]

Duly Verified.

Affidavit of Service by Mail attached. [174]

[Endorsed]: Filed September 22, 1954.

[Title of District Court and Cause No. 55062.]

CERTIFICATE OF REVIEW

To the Honorable Ben Harrison, Judge of the United States District Court for the Southern District of California, Central Division:

I, Hugh L. Dickson, the Referee in Bankruptcy in charge of these proceedings, do hereby certify:

1. That in the course of such proceedings an order was made by me, a copy thereof is hereto annexed. This order was entered on the 15th day of September, 1954.

2. That Rameson Brothers, the petitioner herein, feeling aggrieved thereby, filed its petition to review the said order on the 23rd day of September, 1954.

3. The question presented for review is as follows:

Upon the 17th day of November, 1953, the trustee in bankruptcy, George T. Goggin, through his attorneys, [175] Slane, Mantalica & Davis, filed his Specification of Objections to Discharge, and previously thereto, on the 17th day of March, 1953, Sol Jarmulowsky, through his attorneys, Most, Richland & Lincoln, had filed his Specification of Objections to Discharge. These matters came on for hearing at 2:00 o'clock p.m. on the 30th day of August, 1954, whereat the bankrupt was represented by Paul Taylor and David Sosson, its attorneys.

The objectors claimed that the bankrupt had

failed to keep adequate books, records and accounts, and to satisfactorily explain the deficiency of assets to meet its liabilities. The bankrupt contended, however, that it had committed no acts upon which a denial of discharge could be maintained. After a hearing, upon which oral and documentary evidence was submitted and considered, I made findings of fact and conclusions of law, and thereupon denied petitioner's discharge.

4. Transmitted herewith are:

(a) A copy of the order sought to be reviewed;

(b) The Specifications of Objections to Discharge, filed March 17 and November 17, 1953;

(c) A transcript of the evidence taken upon the hearing;

(d) A transcript of the Section 21-A, examination of the partners constituting Rameson Brothers;

(e) My findings of fact and conclusions of law;

(f) The petition for review.

Dated: September 27, 1954.

/s/ HUGH L. DICKSON,
Referee in Bankruptcy [177]

[Endorsed]: Filed October 6, 1954.

[Title of District Court and Cause No. 55062.]

MEMORANDUM

The order of the Referee denying the above named bankrupt a discharge is hereby affirmed.

The Trustee is directed to submit to appropriate order of affirmance.

Dated: This 14th day of June, 1955.

/s/ BEN HARRISON,

[Endorsed]: Filed June 17, 1955.

In the District Court of the United States, Southern District of California, Central Division

In Bankruptcy—No. 55062-BH

In the Matter of RAMESON BROTHERS, a copartnership composed of WILLIAM W. RAMESON and FREDERICK M. RAMESON, Bankrupt.

ORDER AFFIRMING REFEREE'S ORDER

At Los Angeles, California, in said district, the 14th day of June, 1955.

Rameson Brothers, a copartnership composed of William W. Rameson and Frederick M. Rameson, having petitioned this court for an order to review and reverse the order of the Referee herein, entered on the 15th day of September, 1954, denying petitioners' discharge in bankruptcy, and said peti-

tion upon review having thereupon come on to be heard before this court, whereat petitioners appeared by Paul Taylor and David Sosson, by Paul Taylor, their attorneys, in support thereof and the Trustee appeared by Slane, Mantalica & Davis, by Lewis C. Teegarden, his attorneys, in opposition thereto,

Now, upon due consideration, it is

Ordered that the order of the Referee entered on the 15th day of September, 1954, be and the same is hereby [179] approved and affirmed.

/s/ BEN HARRISON,
Judge

Acknowledgment of Service attached. [180]

[Endorsed]: Lodged July 6, 1955. Filed July 13, 1955. Entered July 14, 1955.

[Title of District Court and Cause No. 55062.]

NOTICE OF APPEAL

To the Honorable Ben Harrison, United States District Judge; to George T. Goggin, as Trustee in Bankruptcy of the Estate of the above named Bankrupt and to Slane, Mantalica & Davis, 257 South Spring Street, Los Angeles, California, his attorneys of Record; To Sol Jarmulowsky, and to Louis Most, Robert N. Richland and Jack Lincoln, 328 South Beverly Drive, Beverly Hills, California, his

attorneys of record, and to John Childress, Clerk of the above entitled Court:

You and each of you will please take notice and notice is hereby given that Rameson Brothers, a copartnership, composed of William E. Rameson and Frederick M. Rameson, Bankrupt, and William E. Rameson and Frederick M. Rameson copartners, and each of them, hereby appeal to the United States Court of Appeals for the Ninth Circuit from that Order, Final Judgment and Decree and the whole thereof filed, docketed and entered in the above entitled matter on the 15th day of July, 1955, in the files and records of the above entitled Court, and which said Order decreed that the Order of the [181] Referee entered on the 15th day of September, 1954, denying the above named bankrupt a discharge be approved and confirmed.

You and each of you will please take further notice that said Rameson Brothers, a copartnership, composed of William E. Rameson and Frederick M. Rameson, Bankrupt, and William E. Rameson and Frederick M. Rameson, copartners, and each of them, likewise hereby appeal to the United States Court of Appeals for the Ninth Circuit from that order, Judgment and Decree dated the 14th day of June, 1955, and the whole thereof, and which said order was on the 17th day of June, 1955, filed, docketed and entered in the files and records of the above entitled Court, and which said Order decreed that the Order of the Referee entered on the 15th day of September, 1954, denying the above named

bankrupt a discharge be approved and confirmed.

Dated this 15 day of July, 1955.

/s/ PAUL TAYLOR and
DAVID SOSSON,
/s/ By PAUL TAYLOR,
/s/ KYLE Z. GRAINGER,

Attorneys for Bankrupt and
Appellant [182]

[Endorsed]: Filed July 15, 1955.

[Title of District Court and Cause No. 55062.]

STATEMENT OF POINTS UPON WHICH APPELLANTS WILL RELY UPON APPEAL

Filed July 15, 1955, from Order, Final Judgment and Decree filed, docketed and entered on the 15th day of July, 1955, and from Order, Judgment and Decree dated June 15, 1955, filed, docketed and entered the 17th day of June, 1955.

Pursuant to Rule 75 D of Rules of Civil Procedure appellants make the following concise statement of points upon which they intend to rely upon this appeal.

I.

The Order, Judgment and Decree of the Court docketed and entered in the above entitled matter on the 15th day of July, 1955, in the files and records of the above entitled court, and which said

Order decreed that the Order of the Referee, entered on the 15th day of September, 1954, denying the above named bankrupt a discharge be approved and affirmed, is erroneous, in that it approved and affirmed an Order denying the bankrupt a discharge, though the evidence was insufficient to establish that said discharge should be denied, but on the contrary established that the discharge should have been granted.

II.

The Order, Judgment and Decree dated the 14th day of June, 1955 and filed, entered and docketed in the files and records of the above entitled court on June 17, 1955, affirming the Order of the [183] Referee entered on the 15th day of September, 1954, denying the above named bankrupt a discharge, is erroneous, in that the evidence is insufficient to establish that said discharge should be denied, but on the contrary established that the discharge should have been granted.

III.

That said Order, Judgment and Decree of the Court docketed and entered in the above entitled matter on the 15th day of July, 1955, in the files and records of the above entitled court, and which said Order decreed that the Order of the Referee, entered on the 15th day of September, 1954, denying the above named bankrupt a discharge be approved and affirmed, is erroneous, in that the Judge

neither made or filed any Findings of Fact or Conclusions of Law upon which to base said Order.

IV.

The Order, Judgment and Decree dated the 14th day of June, 1955, and filed, entered and docketed on June 17, 1955, as aforesaid, confirming the Order of the Referee entered on the 15th day of September, 1954, denying the above named bankrupt a discharge is erroneous, in that the Judge neither made or filed any Findings of Fact and Conclusions of Law upon which to base said Order.

V.

The Order, Judgment and Decree of the Court, docketed and entered in the above entitled matter on the 15th day of July, 1955, in the files and records of the above entitled court, and which said Order decreed that the Order of the Referee entered on the 15th day of September, 1954, denying the above named bankrupt a discharge be approved and affirmed, is erroneous, in that if it be assumed that by implication the Findings of Fact and Conclusions of Law of the Referee were adopted, evidence was not sufficient to support said Findings of Fact and Conclusions of Law. [184]

VI.

The Order, Judgment and Decree dated the 14th day of June, 1955, and filed, entered and docketed on June 17, 1955, as aforesaid affirming and ap-

proving the Order of the Referee entered on the 15th day of September, 1954, denying the above named bankrupt a discharge is erroneous, in that if it be assumed that by implication Findings of Fact and Conclusions of Law of the Referee were adopted, evidence was not sufficient to support said Findings of Fact and Conclusions of Law.

VII.

The Order, Judgment and Decree of the Court docketed and entered in the above entitled matter on the 15th day of July, 1955, in the files and records of the above entitled court, and which said Order decreed that the Order of the Referee, entered on the 15th day of September, 1954, denying the above named bankrupt a discharge be approved and affirmed, is erroneous, in that the Order of the Referee was erroneous in that the evidence was insufficient to support an Order denying the discharge, and such Order was based on erroneous Findings and Conclusions of Law, and such Order should have granted a discharge.

VIII.

The Order, Judgment and Decree dated the 14th day of June, 1955 and filed, entered and docketed on June 17, 1955 as aforesaid, affirming the Order of the Referee entered on the 15th day of September, 1954, denying the above named bankrupt a discharge, and which Order was on the 17th day of June, 1955, filed, docketed and entered in the files

and records of the above entitled court, is erroneous, in that the evidence was insufficient to support an Order denying discharge and such Order was based on erroneous Findings and Conclusions of Law, and such Order should have granted a discharge. [185]

IX.

The Order, Judgment and Decree of the Court docketed and entered in the above entitled matter on the 15th day of July, 1955 in the files and records of the above entitled court, and which said Order decreed that the Order of the Referee entered on the 15th day of September, 1954, denying the above named bankrupt a discharge was erroneous, in that during the course of the hearing before the Referee, the Trustee on August 31, 1954, purportedly did adopt Specifications of Objections heretofore filed by Sol Jarmulowsky, which specifications were not set forth in the specifications filed by the Trustee and constituted new, different and distinct grounds of opposition to the discharge, though the time for filing specifications had long since expired, to wit, on October 15, 1953.

X.

The Order, Judgment and Decree of the Court docketed and entered in the above entitled matter on the 15th day of July, 1955 in the files and records of the above entitled court, and which said Order decreed that the Order of the Referee entered on the 15th day of September, 1954, denying the above named bankrupt a discharge, is erroneous

in that the written Specifications of Objection to bankrupt's discharge in bankruptcy filed by the Trustee do not set forth grounds in accordance with any of the provisions of Section 14, and more particularly Section 14c (7) of the Bankruptcy Act, for a denial of petitioner's discharge.

XI.

The Order, Judgment and Decree dated the 14th day of June, 1955 and filed, entered and docketed on June 17, 1955, as aforesaid, affirming and approving the Order of the Referee entered on the 15th day of September, 1954, denying the above named bankrupt a discharge be approved and affirmed, is erroneous, in that neither the written Specifications of Objection to bankrupt's discharge in bankruptcy filed by the Trustee, nor the written Specifications of Objection [186] filed by Sol Jarmulowsky set forth grounds in accordance with any of the provisions of Section 14, and more particularly Section 14c (7) of the Bankruptcy Act, for a denial of petitioner's discharge.

XII.

The Order, Judgment and Decree of the Court docketed and entered in the above entitled matter on the 15th day of July, 1955 in the files and records of the above entitled court, and which said Order decreed that the Order of the Referee entered on the 15th day of September, 1954, denying the above named bankrupt a discharge is erroneous,

in that the Referee at the hearing on August 31, 1954, permitted wholly immaterial issues, concerning certain specific realty dealings of said Rameson Brothers, the bankrupt copartnership, to be introduced as evidence, despite the fact that no reference thereto was contained in the Specifications of Objection and no grounds for denial of the bankrupt's discharge in bankruptcy were reasonably established thereby in accordance with any of the provisions of Section 14 of the Bankruptcy Act.

XIII.

The Order, Judgment and Decree dated the 14th day of June, 1955 and filed, entered and docketed on the 17th day of June, 1955 as aforesaid, affirming and approving the Order of the Referee entered on the 15th day of September, 1954, denying the above named bankrupt a discharge be approved and affirmed is erroneous, in that the Referee at the hearing on August 31, 1954, permitted wholly immaterial issues concerning certain specific realty dealings of said Rameson Brothers, the bankrupt copartnership, to be introduced as evidence, despite the fact that no reference thereto was contained in the specifications of objection and no grounds for denial of bankrupt's discharge in bankruptcy were reasonably established thereby in accordance with any of the provisions of Section 14 of the Bankruptcy Act. [187]

XIV.

The Order, Judgment and Decree of the Court

docketed and entered in the above entitled matter on the 15th day of July, 1955, in the files and records of the above entitled court, and which said Order decreed that the Order of the Referee entered on the 15th day of September, 1954 denying the above named bankrupt a discharge is erroneous, in that the Specifications of Objection to discharge filed by the Trustee were filed after the time had expired when Specifications of Objection to discharge could be filed under the Order of the Court.

XV.

The Order, Judgment and Decree dated the 14th day of June, 1955 and filed, docketed and entered on June 17, 1955 as aforesaid, affirming and approving the Order of the referee entered on the 15th day of September, 1954, denying the above named bankrupt a discharge be approved and affirmed is erroneous, in that the Specifications of Objection to discharge filed by the Trustee were filed after the time had expired when Specifications of Objection to discharge could be filed under the Order of the Court.

Respectfully submitted,

/s/ PAUL TAYLOR and
DAVID SOSSON,
/s/ By PAUL TAYLOR,
/s/ KYLE Z. GRAINGER,
Attorneys for Appellants [188]

Acknowledgment of Service attached. [189]

[Endorsed]: Filed September 9, 1955.

[Title of District Court and Cause No. 55062.]

ORDER FOR EXTENSION OF TIME FOR FILING RECORD ON APPEAL AND DOCKETING THE APPEAL

It appearing to the Court that Rameson Brothers, a copartnership, composed of William W. Rameson and Frederick M. Rameson, bankrupt, and William W. Rameson and Frederick M. Rameson, copartners, are appellants in an appeal filed on the 15th day of July, 1955, from Order, Final Judgment and Decree and the whole thereof filed, docketed and entered in proceeding No. 55062-BH on the 15th day of July, 1955, and from Order, Judgment and Decree and the whole thereof dated the 14th day of June, 1955, which said Order was on the 17th day of June, 1955, filed, docketed and entered in the files and records of the above entitled court.

And it further appearing that Frederick M. Rameson, bankrupt, filed on the 15th day of July, 1955, in proceeding No. 55190-BH, in this Court in the Matter of Frederick M. Rameson, bankrupt, an appeal from Order, Final Judgment and Decree and the whole thereof filed, docketed and entered in said proceeding No. 55190-BH on the 15th day of July, 1955, and from Order, Judgment and Decree and the whole thereof, dated the 14th day of June, 1955, which said Order [195] was on the 17th day of June 1955, filed, docketed and entered in the files and records in the above entitled court in said proceeding No. 55190-BH.

And it further appearing that William W. Rameson, bankrupt, filed on the 15th day of July, 1955, in proceeding No. 55191-BH in this Court in the Matter of William W. Rameson, bankrupt, an appeal from Order, Final Judgment and Decree and the whole thereof filed, docketed and entered in said proceeding No. 55191-BH on the 15th day of July, 1955, and from Order, Judgment and Decree and the whole thereof dated the 14th day of June, 1955, which said Order was on the 17th day of June, 1955, filed, docketed and entered in the files and records in the above entitled court in proceeding No. 55191-BH.

And it further appearing that the evidence presented and the record on appeal in all of said appeals will be substantially the same and that by cooperation of counsel in the preparation of said record on appeal and the printing thereof, considerable time of the reviewing court, and considerable expense can be saved, and time should be accorded to accomplish such purpose.

And it further appearing to the Court that due to vacation periods, it will be extremely difficult for the clerk of this court to prepare Records on Appeals and his certification thereof in said proceedings and likewise for the attorneys in the case to arrange for proper records on appeal without an extension of time for filing and docketing same in the Appellate Court.

Now Therefore, good cause appearing therefor and on motion of counsel for the appellants,

It Is Ordered that the time within which the Record on Appeal in these proceedings may be filed and the appeal docketed with the Appellate Court in said appeal filed on July 15, 1955, is hereby extended to and including the 7th day of October, 1955.

Dated this 8th day of August, 1955.

/s/ BEN HARRISON,
Judge of the U. S. District Court

We hereby request and consent to the making of the foregoing Order Extending Time.

Dated: August 8, 1955.

/s/ PAUL TAYLOR,
/s/ DAVID SOSSON,
/s/ By KYLE Z. GRAINGER,
Attorneys for Appellants

/s/ SLANE, MANTALICA & DAVIS,
/s/ By LOUIS N. MANTALICA,
Attorneys for Trustee and Appellee

/s/ LOUIS MOST, ROBERT N. RICHLAND and JACK LINCOLN,
/s/ By LOUIS MOST,
Attorneys for Sol Jarmulowsky, Appellee [197]

[Endorsed]: Filed August 8, 1955.

[Title of District Court and Cause No. 55062.]

DOCKET ENTRIES

* * * * *

1955

June 17—Filed memorandum affirm. the order of the Referee denying bkt. a discharge. Trustee to submit appropriate order of affirmance. Mld. copy memorandum to counsel. Copy to Referee Calverley.

* * * * *

July 15—Dktd. and Ent. 7/14/55, ord. affirm. ord. of Ref. ent. 9/15/54, deny petnr. disch. hrtfore fld. 7/13/55. Not. attys.

* * * * *

[Title of District Court and Cause No. 55062.]

CERTIFICATE OF CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 199, inclusive contain the originals of:

Creditors' Petition;

Order of General Reference;

Consent to Adjudication;

Adjudication of Bankruptcy;

Answer of Bankrupt;

Order Approving Trustee's Bond;

Order Fixing Time for Filing Objections to Discharge;

Petition and Order to Extend Time to Object to Discharge; filed March 13, 1953;

Petition and Order to Extend Time to Object to Discharge, filed May 13, 1953;

Petition and Order to Extend Time to Object to Discharge, filed July 15, 1953;

Petition and Order to Extend Time to Object to Discharge, filed Sept. 15, 1953;

Petition and Order to Extend Time to Object to Discharge, filed Oct. 15, 1953;

Supplemental Certificate on Review;

Specification of Objections to Discharge, Trustee's;

Specifications of Objections to Discharge, Sol Jarmulowsky's;

Findings of Fact and Conclusions of Law;

Order Denying Discharge;

Petition for Review of Referee's Order;

Certificate of Review;

Memorandum;

Order Affirming Referee's Order;

Notice of Appeal;

Statement of Points Upon Which Appellants Will Rely Upon Appeal, etc.;

Designation of Portions of the Record, Proceedings and Evidence to be Contained in the Record on Appeal; and

Order for Extension of Time for Filing Record

on Appeal and Docketing the Appeal and a full, true and correct copy of the Docket Entries which, together with Reporter's Transcript of 21-A Examination of Frederick Rameson, William Rameson and Paul Taylor held on January 7, 1953 and Reporter's Transcript of Hearing on Objections to Discharge held on August 31, 1954, transmitted herewith, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to $2.10 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this .... day of November, A.D. 1955.

JOHN A. CHILDRESS,
Clerk

Nos. 14931-32

United States
Court of Appeals
for the Ninth Circuit

No. 14931

FREDERICK M. RAMESON, Bankrupt,
Appellant,

vs.

GEORGE T. GOGGIN, as Trustee in Bankruptcy of the Estate of Frederick M. Rameson, Bankrupt, and SOL JARMULOWSKY,
Appellees.

No. 14932

WILLIAM W. RAMESON, Bankrupt,
Appellant,

vs.

GEORGE T. GOGGIN, as Trustee in Bankruptcy of the Estate of William W. Rameson, Bankrupt, and SOL JARMULOWSKY,
Appellees.

Transcript of Record

Appeals from the United States District Court for the Southern District of California, Central Division

In the District Court of the United States, Southern District of California, Central Division

In Bankruptcy—No. 55190-BH

In the Matter of FREDERICK M. RAMESON, Alleged Bankrupt.

In Bankruptcy—No. 55191-BH

CREDITORS' PETITION

To the Honorable Judge of the District Court of the United States, for the Southern District of California, Central Division:

The petition of Herco Pipe & Supply Company, Inc. of West Los Angeles, a corporation, Lord-Babcock, Inc., a corporation, and Back Panel Company, a corporation, respectfully alleges:

I.

That Frederick M. Rameson has resided within the above judicial district for a longer period of the six months immediately preceding the filing of this petition than in any other judicial district.

II.

That Frederick M. Rameson owes debts in the amount of over $1,000 and is not a wage earner or farmer.

III.

That your petitioners are creditors of said Fred-

erick M. [2] Rameson in that they are creditors of Rameson Brothers, a copartnership composed of William W. Rameson and Frederick M. Rameson; that your petitioners have provable claims against said Frederick M. Rameson, fixed as to liability and liquidated in amount, amounting in the aggregate in excess of the value of securities held by them, to $500. The nature and amount of your petitioners' claims are as follows:

A. The alleged bankrupt is indebted to your petitioner, Herco Pipe & Supply Company, Inc. of West Los Angeles, for goods sold and delivered by the said Herco Pipe & Supply Company, Inc. of West Los Angeles to Rameson Brothers, a copartnership composed of William W. Rameson and the said Frederick M. Rameson; that your petitioner, Herco Pipe & Supply Company, Inc. of West Los Angeles, does not have security for its debt upon the property of the alleged bankrupt and that its securities, if any, are upon the property of persons other than the alleged bankrupt, and that the debt due said petitioner from the alleged bankrupt exceeds the amount of such securities, if any, by an amount in excess of $500.

B. The alleged bankrupt is indebted to your petitioner, Lord-Babcock, Inc., for goods sold and delivered by the said Lord-Babcock, Inc. to Rameson Brothers, a copartnership composed of William W. Rameson and the said Frederick M. Rameson; that your petitioner, Lord-Babcock, Inc. does not have security for its debt upon the property of the al-

leged bankrupt and that its securities, if any, are upon the property of persons other than the alleged bankrupt, and that the debt due said petitioner from the alleged bankrupt exceeds the amount of such securities, if any, by an amount in excess of $500.

C. The alleged bankrupt is indebted to your petitioner, Back Panel Company, in the sum of $591.50 for goods sold and delivered by the said Back Panel Company to Rameson Brothers, [3] a copartnership composed of William W. Rameson and the said Frederick M. Rameson.

IV.

That within four months next preceding the filing of this petition, the said Frederick M. Rameson did, on the 30th day of September, 1952, make a general assignment for the benefit of his creditors to Building Materials Dealers' Credit Association, J. M. Dean, agent for said association.

V.

That the law firm of Slane, Mantalica & Davis are the attorneys for your petitioners and each of them and have been duly authorized by your petitioners and each of them to sign and verify the within petition.

Wherefore, your petitioners pray that service of this petition, with a subpoena, may be made upon the said Frederick M. Rameson, as provided in the Bankruptcy Act, and that he may be adjudged by

this Court to be a bankrupt within the purview of said act.

SLANE, MANTALICA & DAVIS,

/s/ By LLOYD TEVIS,

Attorneys for Petitioning Creditors

Duly Verified. [4]

[Endorsed]: Filed October 23, 1952.

In the District Court of the United States, Southern District of California, Central Division

In Bankruptcy—No. 55191-BH

In the Matter of WILLIAM W. RAMESON, Alleged Bankrupt.

CREDITORS' PETITION

To the Honorable Judge of the District Court of the United States, for the Southern District of California, Central Division:

The petition of Herco Pipe & Supply Company, Inc. of West Los Angeles, a corporation, Lord-Babcock, Inc., a corporation, and Back Panel Company, a corporation, respectfully alleges:

I.

That William W. Rameson has resided within the above judicial district for a longer period of the six months immediately preceding the filing of this petition than in any other judicial district.

II.

That William W. Rameson owes debts in the amount of over $1,000 and is not a wage earner or farmer.

III.

That your petitioners are creditors of said William W. [2] Rameson in that they are creditors of Rameson Brothers, a copartnership composed of William W. Rameson and Frederick M. Rameson; that your petitioners have provable claims against said William W. Rameson, fixed as to liability and liquidated in amount, amounting in the aggregate in excess of the value of securities held by them, to $500. The nature and amount of your petitioners' claims are as follows:

A. The alleged bankrupt is indebted to your petitioner, Herco Pipe & Supply Company, Inc. of West Los Angeles, for goods sold and delivered by the said Herco Pipe & Supply Company, Inc. of West Los Angeles to Rameson Brothers, a copartnership composed of the said William W. Rameson and Frederick M. Rameson; that your petitioner, Herco Pipe & Supply Company, Inc. of West Los Angeles, does not have security for its debt on the property of the alleged bankrupt except under a claim of mechanic's lien in the amount of $96.72 upon Lot 7, Tract 14796, as per map recorded in Book 320, pages 1-3 of Maps, Records of Los Angeles County, commonly known as 14636 Hilltree Road, Los Angeles, California, standing of record in the name of William W. Rameson and Mary

Anita Rameson; that your petitioner, Herco Pipe & Supply Company, Inc. of West Los Angeles, has no other security for its debt upon the property of the alleged bankrupt, other than as aforesaid, and that its securities, if any, are upon the property of persons other than the alleged bankrupt, and that the debt due said petitioner from the alleged bankrupt exceeds the amount of such securities, if any, by an amount in excess of $500.

B. The alleged bankrupt is indebted to your petitioner, Lord-Babcock, Inc., for goods sold and delivered by the said Lord-Babcock, Inc. to Rameson Brothers, a copartnership composed of the said William W. Rameson and Frederick M. Rameson; that your petitioner, Lord-Babcock, Inc., does not have security for its debt on the property of the alleged bankrupt, except under [3] a claim of mechanic's lien in the amount of $1253.32 upon Lot 7, Tract 14796, as per map recorded in Book 320, pages 1-3 of Maps, Records of Los Angeles County, commonly known as 14636 Hilltree Road, Los Angeles, California, standing of record in the name of William W. Rameson and Mary Anita Rameson; that your petitioner, Lord-Babcock, Inc., has no other security for its debt upon the property of the alleged bankrupt, other than as aforesaid, and that its securities, if any, are upon the property of persons other than the alleged bankrupt, and that the debt due said petitioner from the alleged bankrupt exceeds the amount of such securities, if any, by an amount in excess of $500.

C. The alleged bankrupt is indebted to your peti-

tioner, Back Panel Company, in the sum of $591.50 for goods sold and delivered by the said Back Panel Company to Rameson Brothers, a copartnership composed of the said William W. Rameson and Frederick M. Rameson.

IV.

That within four months next preceding the filing of this petition, the said William W. Rameson did, on the 30th day of September, 1952, make a general assignment for the benefit of his creditors to Building Materials Dealers' Credit Association, J. M. Dean, agent for said association.

V.

That the law firm of Slane, Mantalica & Davis are the attorneys for your petitioners and each of them and have been duly authorized by your petitioners and each of them to sign and verify the within petition.

Wherefore, your petitioners pray that service of this petition, with a subpoena, may be made upon the said William W. Rameson, as provided in the Bankruptcy Act, and that he may be [4] adjudged by this Court to be a bankrupt within the purview of said act.

SLANE, MANTALICA & DAVIS,
/s/ By LLOYD TEVIS,
Attorneys for Petitioning Creditors

Duly Verified. [5]

[Endorsed]: Filed October 23, 1952.

[Title of District Court and Causes 55190-55191.]

ORDER OF GENERAL REFERENCE

At Los Angeles, California, in said district on the 23rd day of October, 1952.

Whereas, a petition was filed in this court on the 23rd day of October, 1952, against Frederick M. Rameson, alleged bankrupt above named, praying that he be adjudged a bankrupt under the Act of Congress relating to bankruptcy, and good cause now appearing therefor;

It is ordered that the above-entitled proceeding be, and it hereby is, referred to Hugh L. Dickson, Esq., one of the referees in bankruptcy of this court, to take such further proceedings therein as are required and permitted by said Act, and that the said Frederick W. Rameson shall henceforth attend before said referee and submit to such orders as may be made by him or by a judge of this court relating to said bankruptcy.

/s/ LEON R. YANKWICH,
District Judge [5]

[Endorsed]: Filed October 23, 1952.

[Title of District Court and Causes 55190-55191.]

ADJUDICATION OF BANKRUPTCY

At Los Angeles, in said District, on the 31st day of October, 1952.

The petition of Herco Pipe & Supply Company, Inc. of West Los Angeles, a corporation, Lord-Bab-

cock, Inc., a corporation, and Back Panel Company, a corporation, filed on the 23rd day of October, 1952, that Frederick W. Rameson be adjudged a bankrupt under the Act of Congress relating to bankruptcy, and the alleged bankrupt having consented to adjudication; and there being no opposing interest;

It is adjudged that the said Frederick W. Rameson is a bankrupt under the Act of Congress relating to bankruptcy.

/s/ HUGH L. DICKSON,
Referee in Bankruptcy [6]

[Endorsed]: Filed November 3, 1952.

[Title of District Court and Causes 55190-55191.]

ANSWER OF BANKRUPT

Now comes Frederick M. Rameson, and answering the involuntary petition in bankruptcy filed by his certain creditors makes return and answers the said petition thus:

1. Bankrupt's place of residence is 239 South Orange Drive, Los Angeles, California, within the above judicial district.

2. Bankrupt owes debts and is willing to surrender all its property for the benefit of his creditors, except such as is exempt by law, and desires to obtain the benefit of the Act of Congress relating to bankruptcy.

3. The schedule hereto annexed, marked Sched-

ule A, and verified by the Bankrupt's oath, contains a full and true statement of all his debts, and, so far as it is possible to ascertain, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said Act.

4. The schedule hereto annexed, marked Schedule B, and verified by the Bankrupt's oath, contains an accurate inventory of all his property, real and personal, and such further statements concerning said property as are required by the provisions of said Act.

5. The Bankrupt hereby admits all the allegations in the petition of bankruptcy hereinbefore filed by Bankrupt's creditors.

Wherefore, Bankrupt prays that he may be discharged as a Bankrupt within the purview of said Act.

/s/ FREDERICK M. RAMESON,
Bankrupt

PAUL TAYLOR and
DAVID SOSSON,

/s/ By PAUL TAYLOR,

Attorneys for Bankrupt [7]

Duly Verified. [8]

[Endorsed]: Filed November 26, 1952.

[Title of District Court and Cause No. 55190.]

ORDER APPROVING TRUSTEE'S BOND

At Los Angeles, in said district, on the 10th day of December, 1952.

The above named Frederick M. Rameson, having been duly adjudged a bankrupt on a petition filed by (or against) him on the 31st day of October, 1952; and George T. Goggin, of Los Angeles, in said district, having been duly appointed trustee of the estate of said bankrupt, and having duly qualified by giving a bond with sufficient sureties for the faithful performance of his official duties in the amount fixed by the order of this court, viz., One Hundred and No/100 Dollars ($100.00);

It Is Ordered that the said bond be, and it hereby is, approved.

/s/HUGH L. DICKSON,
Referee in Bankruptcy [142]

[Endorsed]: Filed December 11, 1952.

[Title of District Court and Cause No. 55191.]

ORDER APPROVING TRUSTEE'S BOND

At Los Angeles, in said district, on the 10th day of December, 1952.

The above named William W. Rameson, having been duly adjudged a bankrupt on a petition filed by (or against) him on the 31st day of October, 1952; and George T. Goggin, of Los Angeles, in said

district, having been duly appointed trustee of the estate of said bankrupt, and having duly qualified by giving a bond with sufficient sureties for the faithful performance of his official duties in the amount fixed by the order of this court, viz., Twenty-five Hundred and no/100 Dollars ($2,-500.00).

It Is Ordered that the said bond be, and it hereby is, approved.

/s/ HUGH L. DICKSON,
Referee in Bankruptcy [147]

[Endorsed]: Filed December 10, 1952.

[Title of District Court and Causes 55190-55191.]

ORDER FIXING TIME FOR FILING OBJECTIONS TO DISCHARGE

At Los Angeles, in said district, on the 3rd day of February, 1953.

It appearing that the above named bankrupt has been duly adjudged a bankrupt and has been duly examined at a meeting of creditors as required by the Act of Congress relating to bankruptcy;

It Is Ordered that the 17th day of March, 1953, be, and it hereby is, fixed as the last day for the filing of objections to the discharge of said bankrupt.

/s/ HUGH L. DICKSON,
Referee in Bankruptcy [143]

[Title of District Court and Causes 55190-55191.]

PETITION AND ORDER TO EXTEND TIME TO OBJECT TO DISCHARGE

To the Honorable Hugh L. Dickson, Referee in Bankruptcy:

The verified petition of Slane, Mantalica & Davis, by Lloyd Tevis, respectfully represents:

I.

That they are the duly appointed attorneys for the trustee in the within bankrupt estate.

II.

That they are examining into certain acts of the bankrupt relative to filing objections to his discharge, but will not have the same completed prior to the last date for filing such objections, namely, the 17th day of March, 1953.

Wherefore, your petitioners pray that the last date to file objections to the discharge of the within bankrupt be extended to and including Friday, May 15, 1953.

Dated: March 12, 1953.

SLANE, MANTALICA & DAVIS,

/s/ By LLOYD TEVIS,

Attorneys for Trustee [144]

ORDER

It Is So Ordered.

Dated: March 13, 1953.

/s/ HUGH L. DICKSON,
Referee in Bankruptcy [145]

Duly Verified. [146]

[Endorsed]: Filed March 13, 1953.

[Title of District Court and Causes 55190-55191.]

PETITION AND ORDER TO EXTEND TIME TO OBJECT TO DISCHARGE

To the Honorable Hugh L. Dickson, Referee in Bankruptcy:

The verified petition of Slane, Mantalica & Davis, by Lloyd Tevis, respectfully represents:

I.

That they are the duly appointed attorneys for the trustee in the within bankrupt estate.

II.

That they are examining into certain acts of the bankrupt relative to filing objections to their discharge, but will not have the same completed prior to the last date for filing such objections, namely, the 15th day of May, 1953.

Wherefore, your petitioners pray that the last date to file objections to the discharge of the within

bankrupt be extended to and including July 15, 1953.

Dated: May 12, 1953.

SLANE, MANTALICA & DAVIS,
/s/ By LLOYD TEVIS,
Attorneys for Trustee [147]

ORDER

It Is So Ordered.

Dated: May 13, 1953.

/s/ HUGH L. DICKSON,
Referee in Bankruptcy [148]

Duly Verified. [149]

[Endorsed]: Filed May 13, 1953.

[Title of District Court and Causes 55190-55191.]

PETITION AND ORDER TO EXTEND TIME TO OBJECT TO DISCHARGE

To the Honorable Hugh L. Dickson, Referee in Bankruptcy:

The verified petition of Slane, Mantalica & Davis, by Lloyd Tevis, respectfully represents:

I.

That they are the duly appointed attorneys for the trustee in the within bankrupt estate.

II.

That they are examining into certain acts of the

bankrupt relative to filing objections to their discharge, but will not have the same completed prior to the last date for filing such objections, namely, the 15th day of July, 1953.

Wherefore, your petitioners pray that the last date to file objections to the discharge of the within bankrupt be extended to and including September 15, 1953.

Dated: July 14, 1953.

SLANE, MANTALICA & DAVIS,
/s/ By LLOYD TEVIS,
Attorneys for Trustee [150]

ORDER

It Is So Ordered.

Dated: July 15, 1953.

/s/ HUGH L. DICKSON,
Referee in Bankruptcy [151]

Duly Verified. [152]

[Endorsed]: Filed July 15, 1953.

[Title of District Court and Causes 55190-55191.]

PETITION AND ORDER TO EXTEND TIME TO OBJECT TO DISCHARGE

To the Honorable Hugh L. Dickson, Referee in Bankruptcy:

The verified petition of Slane, Mantalica & Davis, by Lloyd Tevis, respectfully represents:

I.

That they are the duly appointed attorneys for the trustee in the within bankrupt estate.

II.

That they are examining into certain acts of the bankrupt relative to filing objections to his discharge, but will not have the same completed prior to the last date for filing such objections, namely, the 15th day of September, 1953.

Wherefore, your petitioners pray that the last date to file objections to the discharge of the within bankrupt be extended to and including October 15, 1953.

Dated: September 11, 1953.

SLANE, MANTALICA & DAVIS,

/s/ By LLOYD TEVIS,

Attorneys for Trustee [153]

ORDER

It Is So Ordered.

Dated: September 15, 1953.

/s/ HUGH L. DICKSON,
Referee in Bankruptcy [154]

Duly Verified. [155]

[Endorsed]: Filed September 15, 1953.

[Title of District Court and Causes 55190-55191.]

PETITION AND ORDER TO EXTEND TIME TO OBJECT TO DISCHARGE

To the Honorable Hugh L. Dickson, Referee in Bankruptcy:

The verified petition of Slane, Mantalica & Davis, by Louis N. Mantalica, respectfully represents:

I.

That they are the duly appointed attorneys for the Trustee in the within bankrupt estate.

II.

That they are examining into certain acts of the bankrupt relative to filing objections to his discharge, but will not have the same completed prior to the last date for filing such objections, namely, the 15th day of October, 1953.

Wherefore, your petitioners pray that the last date to file objections to the discharge of the within bankrupt be extended to and including November 17, 1953.

Dated: October 15, 1953.

SLANE, MANTALICA & DAVIS,
/s/By LOUIS N. MANTALICA,
Attorneys for Trustee [156]

ORDER

It Is So Ordered.

Dated: October 15, 1953.

/s/ REUBEN G. HUNT,
Referee in Bankruptcy [157]

Duly Verified. [158]

[Endorsed]: Filed October 15, 1953.

[Title of District Court and Causes 55190-55191.]

SUPPLEMENTAL CERTIFICATE ON REVIEW

To the Honorable Ben Harrison, Judge of the United States District Court for the Southern District of California:

I, Joseph J. Rifkind, Referee in Bankruptcy, in charge of and to whom the above entitled matter has been referred after the death of Hugh L. Dickson, to whom the matter was originally referred in compliance with the order of Honorable Ben Harrison, United States District Court, do hereby transmit to said Honorable Ben Harrison, and do certify this Supplemental Certificate on Review, by attaching to this Certificate the following:

1. Order Approving Trustee's Bond dated December 10, 1952;

2. Order Fixing Time for Filing Objections to Discharge dated March 17, 1953;

3. Petition and Order to Extend Time to object to Discharge filed March 13, 1953;

4. Petition and Order to Extend Time to Object to Discharge filed May 13, 1953;

5. Petition and Order to Extend Time to Object to Discharge filed July 15, 1953;

6. Petition and Order to Extend Time to Object to Discharge filed September 15, 1953, and [159]

7. Petition and Order to Extend Time to Object to Discharge filed October 15, 1953.

Dated this 28 day of October, 1955.

/s/ JOSEPH J. RIFKIND,
Referee in Bankruptcy [160]

[Endorsed]: Filed October 28, 1955.

[Title of District Court and Causes 55190-55191.]

SPECIFICATION OF OBJECTIONS TO DISCHARGE

To the Honorable Hugh L. Dickson, Referee in Bankruptcy:

George T. Goggin of Los Angeles, in the County of Los Angeles, State of California, the Trustee of the estates of the above-named bankrupts, having examined into the acts and conduct of said bankrupts and being satisfied that probable grounds exist for the denial of the discharge of said bankrupts and that the public interest so warrants, does hereby

oppose the granting to said bankrupts of a discharge from their debts, and specifies the following as grounds of objection:

I.

That Rameson Brothers, a copartnership composed of [161] William W. Rameson and Frederick M. Rameson, one of the above-named bankrupts, has failed to explain satisfactorily the deficiency of its assets to meet its liabilities, in that when Frederick M. Rameson, one of the copartners of the bankrupt partnership, was interrogated upon his examination in this proceeding, held on the 7th day of January, 1953, as to why the bankrupt partnership suffered serious financial losses, his answer was that he could not account for it.

That Rameson Brothers, a copartnership composed of William W. Rameson and Frederick M. Rameson, one of the above-named bankrupts, has failed to explain satisfactorily the deficiency of its assets to meet its liabilities, in that when William W. Rameson, one of the copartners of the bankrupt partnership, was interrogated upon his examination in this proceeding, held on the 7th day of January, 1953, as to why the bankrupt partnership suffered serious financial losses, his answer was that he could not account for it.

II.

That the bankrupt, Frederick M. Rameson, has failed to explain satisfactorily the deficiency of his

assets to meet his liabilities, in that when he was interrogated upon his examination in this proceeding, held on the 7th day of January, 1953, as to why he suffered serious financial losses, his answer was that he could not account for it.

III.

That the bankrupt, William W. Rameson, has failed to explain satisfactorily the deficiency of his assets to meet his liabilities, in that when he was interrogated upon his examination in this proceeding, held on the 7th day of January, 1953, as to why he suffered serious financial losses, his answer was that he [162] could not account for it.

/s/ GEORGE T. GOGGIN,
Trustee

SLANE, MANTALICA & DAVIS,
/s/ By LLOYD TEVIS,
Attorneys for Trustee [163]

Duly Verified. [164]

[Endorsed]: Filed November 17, 1953.

In the District Court of the United States, Southern District of California, Central Division

In Bankrupcty—No. 55190-BH

In the Matter of FREDERICK M. RAMESON, Bankrupt.

In Bankruptcy—No. 55191-BH

In the Matter of WILLIAM W. RAMESON, Bankrupt.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The trustee in the above entitled bankruptcy having duly filed his Specifications of Objections to Discharge with this Court based upon Section 14C (7) of the Bankruptcy Act, and Sol Jarmulowsky having duly filed his Specifications of Objections to Discharge with said Court based upon Section 14C(2) of the Bankruptcy Act, notice of the hearing whereof, was duly given the bankrupt and to said objectors; and a hearing upon the issues involved having been had before me at 2:00 o'clock p.m. on the 31st day of August, 1954, whereat I received and heard the proofs of the parties in interest, and due consideration having been had thereon, I find as

Findings of Fact

A. Trustee's Objection.

Upon reading and review of portions of the transcript of the Section 21a examination of Frederick

M. Rameson, I find that he has failed to offer any explanation for the deficiency of assets to meet his liabilities. [165]

B. Creditors' Objection.

1. That Frederick M. Rameson and William W. Rameson were the copartners composing the partnership known as Rameson Brothers. Said partnership did follow and utilize the accounting and bookkeeping practices hereinafter enumerated.

2. Said firm frequently prepared checks with which to pay creditors supplying materials in advance of their actual negotiation.

3. Said firm marked bills and invoices as paid when said checks were prepared and not at the time of negotiation.

4. Said firm did frequently give checks to creditors in payment for materials supplied with an oral agreement between said parties not to cash said checks until further notice from Rameson Brothers.

5. Said firm marked bills and invoices as paid when said checks were given out and not when actually cashed and/or negotiated.

6. Said firm was behind in posting entries in its books of accounts or records frequently as long as two or three months.

7. The books of account or records of said firm did not truly reflect its financial condition and business transactions because bills and invoices were marked paid before actual payment and because said firm was behind in posting entries in its books of account or records; and I further find as

Conclusions of Law

A. Trustee's Objection.

1. The bankrupt has failed to explain satisfactorily the deficiency of assets to meet his liabilities.

2. Because of this failure to explain, the application of the bankrupt for his discharge should be denied.

3. That an order to that effect should be entered.

B. Creditors' Objection.

1. That the bankrupt has failed to keep books of account or records from which his financial condition and business transactions might be ascertained.

2. That the application of the bankrupt for his discharge should be denied.

3. That an order to that effect should be entered.

Dated: September 15, 1954.

/s/ HUGH L. DICKSON,
Referee in Bankruptcy [167]

Affidavit of Service by Mail attached. [168]
[Endorsed]: Filed September 15, 1954.

[Title of District Court and Causes 55190-55191.]

ORDER DENYING DISCHARGE

Frederick M. Rameson, having been duly adjudicated bankrupt in this Court, and specifications of objections to his discharge having been duly

filed by George T. Goggin, trustee in the above named bankruptcy, and by Sol Jarmulowsky, notice of the hearing whereof, was duly given to the bankrupt and to said objectors; and said hearing having been duly had thereon, and the proofs of the parties having been duly made at said hearing by Slane, Mantalica & Davis appearing as attorneys for the objecting trustee, Louis Most, Robert N. Richland and Jack Lincoln appearing as attorneys for the objecting creditor, and Paul Taylor appearing as attorney for the bankrupt; and the Court having thereupon filed its findings of fact and conclusions of law,

It Is Now Ordered that the application of the bankrupt for his discharge, be and the same is hereby denied on two distinct grounds, namely those set forth in Sections 14C(2) and 14C(7) of [169] the Bankruptcy Act.

Dated: September 15, 1954.

/s/ HUGH L. DICKSON,
Referee in Bankruptcy [170]

Affidavit of Service by Mail attached. [171]

[Endorsed]: Filed September 15, 1954.

[Title of District Court and Causes 55190-55191.]

PETITION FOR REVIEW OF REFEREE'S ORDER

The Petition of Frederick M. Rameson, bankrupt, herein, respectfully shows:

That in the course of the proceedings herein on August 31, 1954, the certain specifications of objection to your petitioner's discharge in bankruptcy, theretofore filed by George T. Goggin, Trustee in Bankruptcy, and one Sol Jarmulowsky a creditor, came on for hearing before the Honorable Hugh L. Dickson, Referee in Bankruptcy, and following same an order was made and entered by said Referee on September 15, 1954, denying petitioner's discharge in bankruptcy;

That said order was and is erroneous in the following particulars:

1. The written specifications of objection to petitioner's discharge in bankruptcy filed by the Trustee do not set forth grounds in accordance with any of the provisions of Section 14, and more particularly Section 14c (7) of the Bankruptcy Act, for a denial of petitioner's discharge; [172]

2. The evidence adduced at the hearing in support of the Trustee's specifications of objection neither directly nor by inference reasonably established that your petitioner had failed to explain satisfactorily any losses of assets, or deficiency of assets to meet his liabilities;

3. The findings of the Referee and his order denying the discharge are unsupported by the evidence;

4. The written specifications of objection to your petitioner's discharge, of one, Sol Jarmulowsky, a creditor, were filed by him only in Case No. 55062-BH (being Rameson Brothers, a bankrupt copart-

nership, composed of William W. Rameson, brother of your petitioner, and Frederick M. Rameson, your petitioner), and were adopted on oral motion of the Trustee in the within case on August 31, 1954, as the Trustee's additional specifications of objection to your petitioner's discharge, without the assent of the creditor so making same, or his attorney; the same do not set forth any grounds in accordance with the provisions of Section 14, and more particularly Section 14c (2) of the Bankruptcy Act, warranting denial of your petitioner's discharge in bankruptcy;

5. The evidence adduced at the hearing on the specifications of objection of said Sol Jarmulowsky did not reasonably establish that your petitioner failed to keep books of account or records from which his financial condition and business transactions might be ascertained. Rather the said specifications of objection concern themselves solely with a system of check writing referred to therein respecting the business of Rameson Brothers, the bankrupt copartnership;

6. It was not reasonably established at the hearing herein referred to, or in any other hearing in the within case, nor from all the circumstances hereunto pertaining, that your petitioner as an individual, apart from his being a copartner [173] of said Rameson Brothers, the bankrupt copartnership herein referred to, should have kept or was required to keep personal books of account or records from which his financial condition and business transactions might be ascertained, for the

simple reason that he was engaged in no business other than that of Rameson Brothers, the bankrupt copartnership, who maintained a partnership set of books and records;

7. The Referee at the said hearing on August 31, 1954, permitted wholly immaterial issues, concerning certain specific realty dealings of said Rameson Brothers, the bankrupt copartnership, to be introduced in evidence, despite the fact that no reference thereto was contained in the specifications of objection of either the Trustee or of said creditor, and no grounds for the denial of your petitioner's discharge in bankruptcy were reasonably established thereby in accordance with any of the provisions of Section 14 of the Bankruptcy Act;

8. The comments of the Referee throughout the hearing indicate a wholly hostile attitude toward your petitioner, and explain to a degree the error of his resulting order. His repeated references to what he termed 'fraud', and 'going to the public for credit', as having been committed by your petitioner, when in fact no 'fraud' nor 'going to the public for credit' was charged in the specifications of objection of either the Trustee or the objecting creditor, find no support in the evidence whatsoever. This is classically indicative of the ground upon which he in fact based his order denying your petitioner's discharge, and is contrary to the findings of fact and conclusions of law made by him herein.

Wherefore, your petitioner, Frederick M. Rameson, being aggrieved by said order, prays that the

same may be [174] reviewed by a judge of this court, as provided by the Bankruptcy Act.

Dated: September 21, 1954.

PAUL TAYLOR and
DAVID SOSSON,
/s/ DAVID SOSSON,
Attorneys for Bankrupt [175]

Duly Verified.

Affidavit of Service by Mail attached. [176]

[Endorsed] Filed September 22, 1954.

[Title of District Court and Causes 55190-55191.]

CERTIFICATE OF REVIEW

To the Honorable Wm. M. Byrne, Judge of the United States District Court for the Southern District of California, Central Division:

I, Hugh L. Dickson, the Referee in Bankruptcy in charge of these proceedings, do hereby certify:

1. That in the course of such proceedings an order was made by me, a copy whereof is hereto annexed. This order was entered on the 15th day of September, 1954.

2. That Frederick M. Rameson, the petitioner herein, feeling aggrieved thereby, filed his petition to review the said order on the 23rd day of September, 1954.

3. The question presented for review is as follows:

Upon the 17th day of November, 1953, the trustee in bankruptcy, George T. Goggin, through his attorneys, Slane, Mantalica & Davis, filed his Specification of Objections to Discharge in this proceeding, and previously [177] thereto, on the 17th day of March, 1953, Sol Jarmulowsky, through his attorneys, Most, Richland & Lincoln, had filed his Specification of Objections to Discharge in the matter of Rameson Brothers, a copartnership composed of William W. Rameson and Frederick M. Rameson, in Bankruptcy No. 55062-BH. These matters came on for hearing at 2:00 o'clock p.m. on the 30th day of August, 1954, whereat the bankrupt was represented by Paul Taylor and David Sosson, his attorneys.

The objectors claimed that the bankrupt had failed to keep adequate books, records and accounts, and to satisfactorily explain the deficiency of assets to meet his liabilities. The bankrupt contended, however, that he had committed no acts upon which a denial of discharge could be maintained. After a hearing, upon which oral and documentary evidence was submitted and considered, I made findings of fact and conclusions of law, and thereupon denied petitioner's discharge.

4. Transmitted herewith are:

(a) A copy of the order sought to be reviewed;

(b) The Specification of Objections to Discharge;

(c) A transcript of the evidence taken upon the hearing; (with Rameson Brothers Certificate on Review).

(d) A transcript of the Section 21-A, Examination of Frederick M. Rameson; (with Rameson Brothers Certificate).

(e) My findings of fact and conclusions of law;

(f) The petition for review.

Dated: September 27, 1954.

/s/ HUGH L. DICKSON,
Referee in Bankruptcy [178]

[Endorsed]: Filed October 6, 1954.

[Title of District Court and Causes 55190-55191.]

MEMORANDUM

The order of the Referee denying the above named bankrupt a discharge is hereby affirmed.

The Trustee is directed to submit to appropriate order of affirmance.

Dated: This 14 day of June, 1955.

/s/ BEN HARRISON,
Judge [179]

[Endorsed]: Filed June 17, 1955.

In the District Court of the United States, Southern District of California, Central Division

In Bankruptcy—No. 55190-BH

In the Matter of FREDERICK M. RAMESON, Bankrupt.

ORDER AFFIRMING REFEREE'S ORDER

At Los Angeles, California, in said district, the 14th day of June, 1955.

Frederick M. Rameson, having petitioned this court for an order to review and reverse the order of the Referee herein, entered on the 15th day of September, 1954, denying petitioner's discharge in bankruptcy, and said petition upon review having thereupon come on to be heard before this court, whereat petitioner appeared by Paul Taylor and David Sosson, by Paul Taylor, his attorneys, in support thereof, and the Trustee appeared by Slane, Mantalica & Davis, by Lewis C. Teegarden, his attorneys, in opposition thereto,

Now, upon due consideration, it is

Ordered that the order of the Referee entered on the 15th day of September, 1954, be and the same is hereby [180] approved and affirmed.

/s/ BEN HARRISON,
Judge

Acknowledgment of Service attached. [181]

[Endorsed]: Lodged, July 6, 1955. Filed July 13, 1955. Entered July 14, 1955.

In the District Court of the United States, Southern District of California, Central Division

In Bankruptcy—No. 55191-BH

In the Matter of WILLIAM W. RAMESON, Bankrupt.

ORDER AFFIRMING REFEREE'S ORDER

At Los Angeles, California, in said district, the 14th day of June, 1955.

William W. Rameson, having petitioned this court for an order to review and reverse the order of the Referee herein, entered on the 15th day of September, 1954, denying petitioner's discharge in bankruptcy, and said petition upon review having thereupon come on to be heard before this court, whereat petitioner appeared by Paul Taylor and David Sosson, by Paul Taylor, his attorneys, in support thereof, and the Trustee appeared by Slane, Mantalica & Davis, by Lewis C. Teegarden, his attorneys, in opposition thereto,

Now, upon due consideration, it is

Ordered that the order of the Referee entered on the 15th day of September, 1954, be and the same is hereby [185] approved and affirmed.

/s/ BEN HARRISON,
Judge

Acknowledgment of Service attached. [186]

[Endorsed]: Lodged July 6, 1955. Filed July 13, 1955. Entered July 14, 1955.

[Title of District Court and Cause No. 55190.]

NOTICE OF APPEAL

To the Honorable Ben Harrison, United States District Judge; to George T. Goggin, as Trustee in Bankruptcy of the Estate of the above named Bankrupt, and to Slane, Mantalica & Davis, 257 South Spring Street, Los Angeles, California, his attorneys of record; to Sol Jarmulowsky and to Louis Most, Robert N. Richland and Jack Lincoln, 328 South Beverly Drive, Beverly Hills, California, his attorneys of record, and to John Childress, Clerk of the above entitled Court:

You and each of you will please take notice and notice is hereby given that Frederick M. Rameson, bankrupt above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit, from that Order, Final Judgment and Decree and the whole thereof, filed, docketed and entered in the above entitled matter on the 15th day of July, 1955, in the files and records of the above entitled Court, and which said Order decreed that the Order of the Referee entered on the 15th day of September, 1954, denying the above named bankrupt a discharge be approved and confirmed.

You and each of you will please take further notice that said Frederick M. Rameson, bankrupt, likewise hereby appeals to the [182] United States Court of Appeals for the Ninth Circuit from that Order, Judgment and Decree dated the 14th day of June, 1955, and the whole thereof, and which

said order was on the 17th day of June, 1955, filed, docketed and entered in the files and records of the above entitled Court, and which said Order decreed that the Order of the Referee entered on the 15th day of September, 1954, denying the above named bankrupt a discharge be approved and confirmed.

Dated this 15 day of July, 1955.

/s/ PAUL TAYLOR and
DAVID SOSSON,
/s/ By PAUL TAYLOR,
/s/ KYLE Z. GRAINGER,
Attorneys for Bankrupt and
Appellant [183]

[Endorsed]: Filed July 15, 1955.

[Title of District Court and Cause No. 55191.]

NOTICE OF APPEAL

To the Honorable Ben Harrison, United States District Judge; to George T. Goggin, as Trustee in Bankruptcy of the Estate of the above named Bankrupt, and to Slane, Mantalica & Davis, 257 South Spring Street, Los Angeles, California, his attorneys of record; to Sol Jarmulowsky, and to Louis Most, Robert N. Richland and Jack Lincoln, 328 South Beverly Drive, Beverly Hills, California, his attorneys of record, and to John Childress, Clerk of the above entitled Court:

You and each of you will please take notice and notice is hereby given that William W. Rameson,

Bankrupt above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit, from that Order, Final Judgment and Decree and the whole thereof, filed, docketed and entered in the above entitled matter on the 15th day of July, 1955, in the files and records of the above entitled Court, and which said Order decreed that the Order of the Referee entered on the 15th day of September, 1954, denying the above named bankrupt a discharge be approved and confirmed. [187]

You and each of you will please take further notice that said William W. Rameson, Bankrupt, likewise hereby appeals to the United States Court of Appeals for the Ninth Circuit from that Order, Judgment and Decree dated the 14th day of June, 1955, and the whole thereof, and which said order was on the 17th day of June, 1955, filed, docketed and entered in the files and records of the above entitled Court, and which said Order decreed that the Order of the Referee entered on the 15th day of September, 1954, denying the above named bankrupt a discharge be approved and confirmed.

Dated this 15 day of July, 1955.

/s/ PAUL TAYLOR and
DAVID SOSSON,
/s/ By PAUL TAYLOR,
/s/ KYLE Z. GRAINGER,
Attorneys for Bankrupt and
Appellant [188]

[Endorsed]: Filed July 15, 1955.

[Title of District Court and Causes 55190-55191.]

STATEMENT OF POINTS UPON WHICH APPELLANT WILL RELY UPON APPEAL

Filed July 15, 1955 from Order, Final Judgment and Decree Filed, Docketed and Entered on the 15th day of July, 1955, and from Order, Judgment and Decree dated June 14, 1955, Filed, Docketed and Entered the 17th day of June, 1955.

Pursuant to Rule 75 D of Rules of Civil Procedure appellant makes the following concise statement of points upon which he intends to rely upon this appeal.

I.

The Order, Judgment and Decree of the Court docketed and entered in the above entitled matter on the 15th day of July, 1955, in the files and records of the above entitled court, and which said Order decreed that the Order of the Referee, entered on the 15th day of September, 1954, denying the above named bankrupt a discharge be approved and affirmed, is erroneous, in that it approved and affirmed an Order denying the bankrupt a discharge, though the evidence was insufficient to establish that said discharge should be denied, but on the contrary established that the discharge should have been granted.

II.

The Order, Judgment and Decree dated the 14th

day of June, 1955 and filed, docketed and entered in the files and records of the [184] above entitled court on the 17th day of June, 1955, affirming the Order of the Referee entered on the 15th day of September, 1954, denying the above named bankrupt a discharge is erroneous in that the evidence is insufficient to establish that said discharge should be denied, but on the contrary established that the discharge should have been granted.

III.

The Order, Judgment and Decree of the Court docketed and entered in the above entitled matter on the 15th day of July, 1955, in the files and records of the above entitled court, and which said Order decreed that the Order of the Referee, entered on the 15th day of September, 1954, denying the above named bankrupt a discharge, is erroneous, in that it is based in part on alleged specifications of discharge on behalf of Sol Jarmulowsky, when in fact no specifications in opposition to the discharge of this appellant were ever filed on behalf of said Sol Jarmulowsky.

IV.

The Order, Judgment and Decree dated the 14th day of June, 1955, and filed, entered and docketed on June 17, 1955, as aforesaid, affirming and approving the Order of the Referee entered on the 15th day of September, 1954, denying the above named bankrupt a discharge be approved and affirmed, is erroneous, in that it is based in part on alleged specifications of discharge on behalf of Sol

Jarmulowsky, when in fact no specifications in opposition to the discharge of this appellant was ever filed on behalf of said Sol Jarmulowsky.

V.

That said Order, Judgment and Decree of the Court docketed, and entered in the above entitled matter on the 15th day of July, 1955, in the files and records of the above entitled court, and which said Order decreed that the Order of the Referee, entered on the 15th day of September, 1954, denying the above named bankrupt a discharge be approved and affirmed, is erroneous, in that the [185] Judge neither made or filed any Findings of Fact or Conclusions of Law upon which to base said Order.

VI.

The Order, Judgment and Decree dated the 14th day of June, 1955 and filed, docketed and entered in the files and records of the above entitled court on June 17, 1955 as aforesaid, affirming the Order of the Referee entered on the 15th day of September, 1954, denying the above named bankrupt a discharge, is erroneous, in that the Judge neither made or filed any Findings of Fact or Conclusions of Law upon which to base said Order.

VII.

The Order, Judgment and Decree of the Court, docketed and entered in the above entitled matter on the 15th day of July, 1955, in the files and rec-

ords of the above entitled court, and which said Order decreed that the Order of the Referee, entered on the 15th day of September, 1954, denying the above named bankrupt a discharge be approved and affirmed, is erroneous, in that if it be assumed that by implication the Findings of Fact and Conclusions of Law of the Referee were adopted, evidence was not sufficient to support said Findings of Fact and Conclusions of Law.

VIII.

The Order, Judgment and Decree dated the 14th day of June, 1955 and filed, docketed and entered in the files and records of the above entitled court on the 17th day of June, 1955, as aforesaid, affirming and approving the Order of the Referee entered on the 15th day of September, 1954, denying the above named bankrupt a discharge be approved and affirmed, is erroneous, in that if it be assumed that by implication Findings of Fact and Conclusions of Law of the Referee were adopted, evidence was not sufficient to support said Findings of Fact and Conclusions of Law.

IX.

The Order, Judgment and Decree of the Court docketed and [186] entered in the above entitled matter on the 15th day of July, 1955 in the files and records of the above entitled court, and which said Order decreed that the Order of the Referee, entered on the 15th day of September, 1954, denying the above named bankrupt a discharge be ap-

proved and affirmed, is erroneous, in that the Order of the Referee was erroneous in that the evidence was insufficient to support an Order denying discharge, and such Order was based on erroneous Findings of Fact and Conclusions of Law.

X.

The Order, Judgment and Decree dated the 14th day of June, 1955 and filed, entered and docketed in the files and records of the above entitled court on June 17, 1955 as aforesaid, affirming the Order of the Referee entered on the 15th day of September, 1954, denying the above named bankrupt a discharge be approved and affirmed, is erroneous, in that the evidence was insufficient to support an Order denying the discharge and such Order was based on erroneous Findings and Conclusions of Law.

XI.

The Order, Judgment and Decree of the Court docketed and entered in the above entitled matter on the 15th day of July, 1955, in the files and records of the above entitled court, and which said Order decreed that the Order of the Referee, entered on the 15th day of September, 1954, denying the above named bankrupt a discharge is erroneous, in that said Order approved and affirmed an Order of the Referee, which Order of the Referee was erroneous in that it was based in part on specifications of objections of Sol Jarmulowsky, allegedly made by Sol Jarmulowsky, though in fact no such specifications of objections existed and that the al-

leged specifications were allegedly adopted on August 31, 1954, by the Trustee, long after the time had expired for filing specifications of objection and such alleged specifications constituted new and different ground of objection on behalf of the Trustee.

XII.

The Order, Judgment and Decree dated the 14th day of June, 1955 and filed, docketed and entered in the files and records of the above entitled court on June 17, 1955 as aforesaid approving and affirming the Order of the Referee entered on the 15th day of September, 1954, denying the above named bankrupt a discharge is erroneous, in that said Order approved and affirmed an Order of the Referee, which Order of the Referee was erroneous in that it was based in part on Specifications of Objections of Sol Jarmulowsky, allegedly made by Sol Jarmulowsky, though in fact no such specifications of objections existed and that the alleged specifications were allegedly adopted on August 31, 1954, by the Trustee, long after the time had expired for filing Specifications of Objection and such alleged specifications constituted new and different grounds of objection on behalf of the Trustee.

XIII.

The Order, Judgment and Decree of the Court docketed and entered in the above entitled matter on the 15th day of July, 1955 in the files and records of the above entitled court, and which said Order decreed that the Order of the Referee

entered on the 15th day of September, 1954 denying the above named bankrupt a discharge is erroneous, in that the written Specifications of Objection to bankrupt's discharge in bankruptcy filed by the Trustee do not set forth grounds in accordance with any of the provisions of Section 14 and more particularly Section 14c (7) of the Bankruptcy Act, for a denial of petitioner's discharge.

XIV.

The Order, Judgment and Decree dated the 14th day of June, 1955 and filed, entered and docketed on June 17, 1955 as aforesaid, affirming and approving the Order of the Referee entered on the 15th day of September, 1954, denying the above named bankrupt a discharge, be approved and affirmed, is erroneous, in that the [188] written Specifications of Objection to bankrupt's discharge in bankruptcy filed by the Trustee do not set forth grounds in accordance with any of the provisions of Section 14, and more particularly Section 14c (7) of the Bankruptcy Act, for a denial of petitioner's discharge.

XV.

The Order, Judgment and Decree of the Court docketed and entered in the above entitled matter on the 15th day of July, 1955 in the files and records of the above entitled court, and which said Order decreed that the Order of the Referee, entered on the 15th day of September, 1954 denying the above named bankrupt a discharge is erroneous, in that it was not reasonably established from the

evidence that the bankrupt, appellant in this case as an individual, apart from his being copartner of Rameson Brothers, should have kept, or was required to keep personal books of account or records from which his financial condition and business transactions might be ascertained, for the reason that he was engaged in no business other than that of Rameson Brothers, the bankrupt copartnership, who maintained a partnership set of books and records.

XVI.

The Order, Judgment and Decree dated the 14th day of June, 1955 and filed, entered and docketed the 17th day of June, 1955 as aforesaid, affirming and approving the Order of the Referee entered on the 15th day of September, 1954, denying the above named bankrupt a discharge be approved and affirmed, is erroneous, in that it was not reasonably established from the evidence that the bankrupt, appellant in this case as an individual, apart from his being copartner of Rameson Brothers, should have kept, or was required to keep personal books of account or records from which his financial condition and business transactions might be ascertained, for the reason that he was engaged in no business other than that of Rameson Brothers, the bankrupt copartnership, who maintained a partnership set of books and records [189]

XVII.

The Order, Judgment and Decree of the Court docketed and entered in the above entitled matter

ords of the above entitled court, and which said Order decreed that the Order of the Referee, entered on the 15th day of September, 1954, denying the above named bankrupt a discharge is erroneous, in that the Referee at the hearing on August 31, 1954, permitted wholly immaterial issues, concerning certain specific realty dealings of said Rameson Brothers, the bankrupt copartnership, to be introduced as evidence, despite the fact that no reference thereto was contained in the Specifications of Objection and no grounds for denial of the bankrupt's discharge in bankruptcy were reasonably established thereby in accordance with any of the provisions of Section 14 of the Bankruptcy Act.

XVIII.

The Order, Judgment and Decree dated the 14th day of June, 1955 and filed, entered and docketed on the 17th day of June, 1955 as aforesaid, affirming and approving the Order of the Referee entered on the 15th day of September, 1954, denying the above named bankrupt a discharge be approved and affirmed is erroneous, in that the Referee at the hearing on August 31, 1954, permitted wholly immaterial issues, concerning certain specific dealings of said Rameson Brothers, the bankrupt copartnership, to be introduced as evidence, despite the fact that no reference thereto was contained in the Specifications of Objection and no grounds for denial of the bankrupt's discharge in bankruptcy were reasonably established thereby in accordance with

any of the provisions of Section 14 of the Bankruptcy Act.

Respectfully submitted.

/s/ PAUL TAYLOR and
DAVID SOSSON,
/s/ By PAUL TAYLOR,
/s/ KYLE Z. GRAINGER,
Attorneys for Appellant [190]

[No. 55191 is the same as above except for the following additional paragraphs:]

XIX.

The Order, Judgment and Decree of the Court docketed and [195] entered in the above entitled matter on the 15th day of July, 1955 in the files and records of the above entitled court, and which said Order decreed that the Order of the Referee entered on the 15th day of September, 1954, denying the above named bankrupt a discharge is erroneous, in that the Order of the Referee dated October 16, 1953 was made after the time for filing Specifications of Objection to discharge had expired under the previous Order of the Court.

XX.

The Order, Judgment and Decree dated the 14th day of June, 1955 and filed, entered and docketed on June 17, 1955, as aforesaid, affirming and approving the Order of the Referee entered on the 15th day of September, 1954, denying the above named bankrupt a discharge be approved and af-

firmed is erroneous, in that the Order of the Referee dated October 16, 1953 was made after the time for filing Specifications of Objection to discharge had expired under the previous Order of the Court.

Acknowledgments of Service attached. [191]

[Endorsed]: Filed September 9, 1955.

[Title of District Court and Causes 55190-55191.]

ORDER FOR EXTENSION OF TIME FOR FILING RECORD ON APPEAL AND DOCKETING THE APPEAL

It appearing to the Court that Frederick M. Rameson, bankrupt, appellant in an appeal filed on the 15th day of July, 1955, from Order, Final Judgment and Decree and the whole thereof filed, docketed and entered in proceeding No. 55190-BH on the 15th day of July, 1955, and from Order, Judgment and Decree and the whole thereof dated the 14th day of June, 1955, which said Order was on the 17th day of June, 1955, filed, docketed and entered in the files and records of the above entitled court.

And it further appearing that Rameson Brothers, a copartnership, composed of William W. Rameson and Frederick M. Rameson, bankrupt, and William W. Rameson and Frederick M. Rameson, copartners, filed on the 15th day of July, 1955, in proceeding No. 55062-BH in this Court in the Matter of Rame-

son Brothers, a copartnership, composed of William W. Rameson and Frederick M. Rameson, bankrupt, an appeal from Order, Final Judgment and Decree and the whole thereof filed, docketed and entered in said proceeding No. 55062-BH on the 15th day of July, 1955, and from Order, Judgment and Decree and the whole thereof, dated the 14th day of June, 1955, which said order was on the 17th day of June, 1955, filed, docketed and [197] entered in the files and records in the above entitled court in said proceeding No. 55062-BH.

And it further appearing that William W. Rameson, bankrupt, filed on the 15th day of July, 1955, in proceeding No. 55191-BH, in this Court in the Matter of William W. Rameson, bankrupt, an appeal from Order, Final Judgment and Decree and the whole thereof filed, docketed and entered in said proceeding No. 55191-BH on the 15th day of July, 1955, and from Order, Judgment and Decree and the whole thereof, dated the 14th day of June, 1955, which said Order was on the 17th day of June, 1955, filed, docketed and entered in the files and records in the above entitled Court in said proceeding No. 55191-BH.

And it further appearing that the evidence presented and the record on appeal in all of said appeals will be substantially the same and by cooperation of counsel in the preparation of said record on appeal and the printing thereof, considerable time of the reviewing court, and considerable expense can be saved, and time should be accorded to accomplish such purpose.

And it further appearing to the Court that due to vacation periods, it will be extremely difficult for the clerk of this court to prepare Records on Appeals and his certification thereof in said proceedings and likewise for the attorneys in the case to arrange for proper records on appeal without an extension of time for filing and docketing same in the Appellate Court.

Now Therefore, good cause appearing therefor and on motion of counsel for the appellants,

It Is Ordered that the time within which the Record on Appeal in these proceedings may be filed and the appeal docketed with the Appellate Court in said appeal filed on July 15, 1955, is hereby extended to and including the 7th day of October, 1955.

Dated this 8th day of August, 1955.

/s/ BEN HARRISON,
Judge of the U. S. District Court

We hereby request and consent to the making of the foregoing order extending time dated August 8, 1955.

/s/ PAUL TAYLOR, DAVID SOSSON,
/s/ By KYLE Z. GRAINGER,
Attorneys for Appellants

/s/ SLANE, MANTALICA & DAVIS,
/s/ By LOUIS N. MANTALICA,
Attorneys for Trustee and Appellee

LOUIS MOST, ROBERT N. RICHLAND & JACK LINCOLN,

/s/ By LOUIS MOST,

Attorneys for Sol Jarmulowsky, Appellee [199]

[Endorsed]: Filed August 8, 1955.

[Title of District Court and Causes 55190-55191.]

DOCKET ENTRIES

* * * * *

1955

June 17—Filed Memorandum affirm. the order of the Referee denying bkpt. a discharge. Trustee to submit appropriate order of affirmance. Mld copy Memorandum to counsel. copy to Referee Calverley.

* * * * *

July 15—Dkt. and Ent. 7-14-55, ord. affirm. ord. of Ref. ent. 9-15-54, deny. petnr. disch., hrtfore fld. 7-13-55. Not. Attys.

* * * * *

[Title of District Court and Causes 55190-55191.]

CERTIFICATE OF CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages

numbered from 1 to 201, inclusive, contain the originals of:

Creditors' Petition;

Order of General Reference;

Adjudication of Bankruptcy;

Answer of Bankrupt;

Order Approving Trustee's Bond;

Order Fixing Time for Filing Objections to Discharge;

Petition and Order to Extend Time to Object to Discharge, filed March 13, 1953;

Petition and Order to Extend Time to Object to Discharge, filed May 13, 1953;

Petition and Order to Extend Time to Object to Discharge, filed July 15, 1953;

Petition and Order to Extend Time to Object to Discharge, filed September 15, 1953;

Petition and Order to Extend Time to Object to Discharge, filed October 13, 1953;

Supplemental Certificate on Review;

Specifications of Objections to Discharge, Trustee's;

Findings of Fact and Conclusions of Law;

Order Denying Discharge;

Petition for Review of Referee's Order;

Certificate on Review;

Memorandum;

Order Affirming Referee's Order;

Notice of Appeal;

Statement of Points Upon Which Appellants Will Rely Upon Appeal, etc.;

Designation of Portions of the Record, Proceedings and Evidence to be Contained in the Record on Appeal; and

Order for Extension of Time for Filing Record on Appeal and Docketing Appeal and a full, true and correct copy of the Docket Entries which, together with the Reporter's Transcript of 21-A Examination of Frederick Rameson, William Rameson and Paul Taylor held on January 7, 1953 and Reporter's Transcript of Hearing on Objections to Discharge held on August 31, 1954, transmitted herewith, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to $2.10 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this .. day of November, A.D. 1955.

JOHN A. CHILDRESS,
Clerk

In the District Court of the United States, Southern District of California, Central Division

Nos. 55062-BH, 55190-WB, 55191-WB

In the Matter of

RAMESON BROTHERS,
FREDERICK RAMESON,
WILLIAM M. RAMESON,

Bankrupts.

21-A EXAMINATION OF FREDERICK RAMESON and WILLIAM W. RAMESON and PAUL TAYLOR

The following is a stenographic transcript of the proceedings had in the above-entitled cause, which came on for hearing before the Honorable Hugh L. Dickson, Referee in Bankruptcy, at his courtroom, 343 Federal Building, Los Angeles, California, at 2:00 o'clock p.m., Wednesday, January 7, 1953.

Appearances: Slane, Mantalica and Davis, by Harold A. Slane, Lloyd J. Tevis, appearing on behalf of the Trustee. Paul Taylor appearing on behalf of the Bankrupts. [1*]

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* Page numbers appearing at top of page of original Reporter's Transcript of Record.

FREDERICK MILLARD RAMESON

having been first duly sworn, called as a witness on behalf of the Trustee, testified as follows:

Direct Examination

Q. (By Mr. Slane): Will you state your full name, please?

A. Frederick Millard Rameson.

Q. Are you one of the partners in the Rameson Brothers Company, the Bankrupt in this matter?

A. Yes, sir.

Q. Who were the other partners?

A. William W. Rameson, my brother.

Q. Just the two of you? A. Yes, sir.

Q. Was your other brother connected with the concern?

A. He was employed by the concern as an employee, but he was not connected with the administration or control.

Q. What was his job there?

A. He was in a sales capacity, sir.

Q. What was the relationship between the partnership and T. R. Donaldson?

A. Mr. Donaldson operated our plumbing division. He operated it as an independent plumbing contractor because that is the status—I am trying to choose my words here—in other words, a plumber cannot work for a general contractor and he did not as such, but the company bought all [2] of his supplies.

Q. Isn't it true that supplies were all bought

(Testimony of Frederick Millard Rameson.)

under the name of Rameson Brothers and T. R. Donaldson?

A. That is correct, sir. I believe that was so because a plumbing supplier does not sell directly to a plumbing contractor. He has to sell to a housing contractor.

Q. You did not have a State contractor's plumbing license in the name of Rameson Brothers?

A. I don't believe so.

Q. The State contractor's plumbing license was in the name of T. R. Donaldson?

A. I believe that is correct.

Q. What was the basis of his compensation?

A. I believe I am unable to answer that, just whether he was exactly—you see, I wasn't directly involved in the construction end. I was primarily with the sales and I don't know the financial arrangement or consideration or arrangements between Donaldson and the company.

Q. Who would know that?

A. Bill Rameson, I believe. He was in charge of construction and he would know that.

Q. You have examined the schedules filed in this matter, this big document? A. Yes, sir.

Q. Are you familiar with it?

A. Yes, sir. [3]

Q. In your position with the partnership what were your primary duties?

A. My primary obligation was in charge of sales.

Q. You would contact the people who wanted to build homes?

(Testimony of Frederick Millard Rameson.)

A. No. I did originally, but as time went on we had salesman working directly with the public through our division sales manager and our sales representatives. I did contact some of the public, but the vast majority of the public were contacted by our representatives.

Q. Did you have contacts with the financing institutions? A. Yes, I did, sir.

Q. You handled most of that relationship?

A. Again I did at first, sir, but the division sales managers as time went on and within the last five or six months, the vast majority of financing relationship between the financial institutions and our organization was handled by our divisional sales managers.

Q. In general, your operations worked in what manner?

A. We had an architectural staff for any individuals who desired to obtain a home and by one means or another they would come in contact with our advertisements and our name. They would come in to visit us with regard to planning a home. Then we would proceed through the preliminary architectural phases and the financial working plans and [4] then into the other parts. We would help them arrange financing and then we would go on into the physical construction of the house.

Q. Under your operation, in addition to the plumbing operation, you had an electrical division?

A. That is correct.

Q. A landscaping division?

(Testimony of Frederick Millard Rameson.)

A. That is correct.

Q. Architectural service?

A. Architectural service.

Q. A cabinet shop? A. That is correct.

Q. A paint shop? A. That is correct.

Q. Interior decorating?

A. That is correct.

Q. In other words, practically the entire job of constructing a home?

A. Our plans were ultimately to have a complete service.

Q. Suppose I came in and asked you to build a home, what were the mechanics of it? Did I deed the lot to you or how did it work?

A. They retained complete title to the lot. There were exceptions to that, but as a general rule and in the vast majority of cases the client would contact one of our [5] sales representatives first and then after they became a definite client they would be put under the control of the divisional sales manager who would then control with them the preparation of the preliminary drawings, and after the approval of the preliminary drawings would go into the working drawings. Once those were finally prepared and approved, then they were submitted either through our assistance or through the direct efforts of the client to financing, and once that was secured and a loan recorded—of course, once the financing was pretty well established then they would go into the signing of the contract and specifications. Then as soon as we had clearance on the

(Testimony of Frederick Millard Rameson.)

loan reporting we would go into the physical consideration.

Q. Did you take these jobs on the basis of a fixed price? A. Always, sir.

Q. In other words, you had the plans and you told the party it would cost $24,000 or whatever it was to build a home? A. That is correct.

Q. You were primarily building what we call custom houses; they were built pretty much to individual design?

A. That is correct, sir. We had certain designs.

Q. In your relationship with the financing institutions which ones did you use primarily?

A. Primarily we used the California Federal Savings [6] and Loan, the Security Federal Savings and Loan. I suppose they were the ones used most often. We did use Pacific Mutual Insurance Company and Glendale Federal, and several others in somewhat lesser amounts.

Q. On what basis were those funds made available for those institutions? Was it a progress payment type of deal? A. That is correct, sir.

Q. Do you recall what the stages were, the percentages that were to be paid at certain stages of construction?

A. The usual stages of construction. The first stage is the foundation, when that is in and the lumber is on the job. The second stage is when it is completely roofed and ready for plastering. The third stage is when the plastering is completed. The fourth stage is when the house is finished in all re-

(Testimony of Frederick Millard Rameson.)

spects. The fifth stage is thirty days following the record of the Notice of Completion.

Q. What were the percentage of payments made at each stage?

A. If I recall correctly, they were 20—25, 12, 20 and 10, as my memory serves me.

Q. When it came time for a progress payment to be made, what was the method of procedure used to secure that payment?

A. Ordinarily we would call the lending institution [7] to make their progress inspection. When they made the progress inspection they would disburse or mail or pay the check covering that individual disbursement.

Q. Were any documents or certificates required from Rameson Brothers before they would make a disbursement?

A. I believe that was always the case on the final disbursement. Whether or not some institutions required that at other stages I cannot say exactly.

Q. Did you sign those documents yourself?

A. The final ones I usually did.

Q. In those documents you would certify among other things that all of the labor and material being used on the job had been paid for?

Mr. Taylor: Your Honor, I am aware of the fact that a Bankrupt perhaps is not entitled to be represented by counsel, but I am asking the Court's permission to say this: In the absence of the instrument the answer to that question might tend to in-

(Testimony of Frederick Millard Rameson.)

criminate him and for that reason I advise him not to answer.

The Referee: What do you say, Mr. Witness, that the answer to this question might tend to incriminate you?

The Witness: Isn't the question in regard to what the physical document contained and the writing that is on it?

Mr. Slane: I was trying to get at this. I wanted to [8] know the general procedure. I have knowledge of the facts, Your Honor, that certain phases of this matter are under investigation by the District Attorney's office.

The Referee: I don't want this man to answer questions that would incriminate him.

Mr. Slane: No. I try to make the question more general in nature rather than specific.

The Referee: Can you answer it generally without reference to any specific case?

The Witness: I believe the general contents of the documents that were executed at the expiration of the lien period do contain a clause to that effect.

The Referee: That is ordinarily the custom, isn't it?

The Witness: Yes, sir.

Mr. Slane: Q. When was the firm of Rameson Brothers established?

A. I will have to do the best I can as far as dates are concerned. It was 1949, sir, in October 1949.

(Testimony of Frederick Millard Rameson.)

Q. In October 1949 with the same two partners, you and your brother William?

A. That is correct, sir.

Q. You continued as partners throughout?

A. That is correct.

Q. There were no other partners in the transactions? A. That is correct.

Q. What was the original capital investment on the [9] part of each of you?

A. It was very small, sir. I am afraid I cannot answer the exact figure as to what amount it was, but it was not a sizable amount at all.

Q. Was it a couple of thousand dollars apiece?

A. I don't believe it was even quite that much, sir.

Q. You opened up in October 1949. This petition, I believe, was filed in October of last year which would mean that you were in business approximately three years?

A. That is correct, sir.

Q. According to the schedules you amassed liabilities of a million and three hundred eighty-seven odd thousand dollars and assets of approximately two hundred thousand dollars?

A. Mr. Slane, I don't know whether it is proper or not at this time, but I believe according to the way the documents are written there is some contingent liability.

Q. That is correct. We understand that.

A. And that is a majority of that amount. I mean I am not familiar with the method of prepar-

(Testimony of Frederick Millard Rameson.)

ing legal documents, as far as documents are concerned, but the actual figures in my mind, the actual liabilities are vastly less than that, even though the legal way of presenting it might be different.

Q. I believe the contingent liability items, that is to say, those unfinished contracts, amounted to some [10] four hundred odd thousand dollars which would still leave nearly nine hundred thousand as general liabilities of the partnership. What I am trying to get at is this. How do you account for this thing happening? In other words, what was wrong with the operation of the business that brought about this serious condition in less than three years?

A. Well, actually in my mind, in putting the figures together outside of the way to properly, legally present them, in my own calculations it appeared that the total net, after the whole thing was over, the total net deficiency apparently from information supplied to me was somewhere around $200,000, which is an amount somewhat different than appears on the schedule even though it is probably correct.

The Referee: How do you account for that loss however much or little it might have been?

The Witness: I believe it was relevant to establish the fact that it was relatively smaller than suggested.

The Referee: Assume it was $100,000, tell us how you account for having lost that much.

The Witness: Frankly, sir, I cannot account for

(Testimony of Frederick Millard Rameson.)

it. When I was exposed to the information, when I received the first balance sheet that I had any knowledge of whatsoever the fact that our business lost any money, let alone not being in the financial status that I thought it was, I have [11] the date in my pocket, I believe it was the first part of September when my accounting organization finally gave me the figure and it was the first time to my knowledge according to my concept that we were in a position that was in a financial bankruptcy stage.

The Referee: Did you have a highly paid staff of employees such as engineers? Did you have a big payroll?

The Witness: Yes, sir.

The Referee: Do you know approximately what it amounted to a month?

The Witness: As far as the office payroll is concerned or construction?

The Referee: Everything together.

The Witness: The amount of the construction payroll would be relevant to the number of houses we had under construction at that given time which would be a variable factor. I believe that the cost of operation as far as the office is concerned was somewhere in the neighborhood of $20,000 a month. That was about the cost of doing business as far as the major office was concerned.

The Referee: What type of commission did you pay for getting customers?

The Witness: 1½ per cent.

(Testimony of Frederick Millard Rameson.)

The Referee: Of the cost of the house?

The Witness: It was usually started out at $100 per house and it worked up to $200 and then $250. We were trying [12] to establish what we felt would be a proper sales commission. I believe we finally ended up with 1½ per cent of the contract price for our sales commission.

The Referee: If a house cost $20,000 the man would get 1½ per cent?

The Witness: That is right.

The Referee: Go ahead, Mr. Slane.

Mr. Slane: Q. What was the average cost or did you have an average cost? I believe you ran ads in the newspapers and on radio and television. What was the figure you quoted in the ads that you could build a house for per square foot?

A. The cost per square foot is a very misleading thing. It all depends on what the house contains. A house can cost anywhere from $5 per square foot to $25 or more per square foot.

Q. What figure did you use in the ads?

A. It would depend on what house we were advertising at that moment. If we were advertising the cottage series I believe it was $7.25 per square foot. If we were advertising the contemporary series is might drop as low as $6.80 or more.

Q. Didn't you have one series at $8.50?

A. Yes, we did.

Q. It seems to me you did.

A. Yes. We had various series at different prices. [13]

(Testimony of Frederick Millard Rameson.)

Q. What were your actual costs to build those houses?

A. According to my information and on what I base the sales business, on a minimum fee that we tried to establish in building a house was $2500. In some cases we would charge $200 gross up and above the actual cost of construction which would range anywhere from there up to $5000 or $6000.

Q. You had a cost accounting system out there, didn't you? A. Yes, sir.

Q. So you knew what your costs were in building houses? A. Yes, sir.

Q. How much per square foot did it cost you to build houses?

A. I never interpolated it into a square foot cost, so I am not prepared to answer the question without going through a division process in my mind. In the cottage series it was $12,800. I never interpreted it in square foot cost.

Q. How much did it cost to build the cottage series house?

A. I believe the cottage series was 14.8 and I think we were hitting it close to 12.8 cost, according to the information I had available to me. [14]

Q. What about the other series?

A. I was supplied every Monday at our meetings with sheets from each of my divisions showing the original cost estimates of what a house was originally set up to cost with the estimated gross profit that the house was supposed to return. Each Monday I had each division manager submit in

(Testimony of Frederick Millard Rameson.)

writing to me at our meetings the exact status of that individual house as of that meeting so that I could compare those houses with how they were originally sold, on what basis they were originally sold. In addition to that, we had in our accounting system what we called an index quotient rating which was the relationship between the estimated cost of construction and the actual cost of construction. From this information, from those two media, the information I had at my disposal we were coming remarkably close to our estimated cost of construction, in our actual cost of construction of those houses.

Q. In other words, you should have been making some two or three thousand dollars in profit per house.

A. That is correct, sir, and I think I was.

Q. How do you account for this tremendous loss?

A. I frankly cannot, sir. You see, once I became aware of this situation occurring—I received the documents from the accounting department on a Friday after putting the pressure on them. They gave it to me. The balance sheet showed somewhere in the neighborhood of [15] $80,000. That was the first time I was aware at all of any problem existing financially in our organization outside of the problem which we had since we started. We have always been operating close because it took a lot of capital.

(Testimony of Frederick Millard Rameson.)

Q. Had you ever given any financial statement to any corporation?

A. No, sir. I never gave out a financial statement to any one.

Q. You have been requested to, haven't you?

A. Sir, in the last 60 to 90 days we had been requested, I believe—well, specifically by two lending institutions to do so, but generally it was a general practice for some one to ask or request a financial statement, but we told them, every lending institution and every creditor we did business with, we told them why we did not offer a financial statement, because it would have shown undercapitalization; we were doing a big volume of business and did not have a great deal to start with. I told them that before we started business and they knew it.

Q. Did you give a statement to Dun and Bradstreet? A. Never, sir.

Q. Where did they get the figure they had?

A. A representative of Dun and Bradstreet would stop by the office every few months. We would sit down and talk about it, but I refused to give a statement to him, also. [16] We talked generally about the status of the business, how we were progressing. As a matter of fact, he was an interesting chap. He was interested in how the business was developing and what new units we were adding to the business. I refused to give them a financial statement for the same reason I did not give it to any one else.

(Testimony of Frederick Millard Rameson.)

Q. How often did you receive a statement of the business personally?

A. Apparently that was the thing I should have gotten sooner, but I didn't. I relied perhaps more than I should on this information. We set up the business with certain specific goals in mind. I felt we were meeting those goals and I should have or we should have—now, of course, we can see that we should have demanded financial statements much faster and much quicker than we actually had them given to us. Every day we were trying to improve our accounting system. As a matter of fact, we were very proud of our accounting system. In fact, just about all of the managers and vice presidents of the banks and lending institutions and our creditors —even Builders' Control—tried to set up a similar system. We were proud of what we were accomplishing and explained how we were doing it. We were gradually always improving that system and for one reason or another I did not specifically demand, I guess I didn't know enough to demand specific financial statements. [17]

Q. What was the fiscal year in which the partnership operated?

A. I believe it was when we started, sir.

Q. When did you last file an income tax?

A. It was August each year, I believe.

Q. When did you last file an income tax return?

A. I believe a year ago because I believe a few days prior to the—when all of this business came up was when we closed our fiscal year.

(Testimony of Frederick Millard Rameson.)

Q. What did the tax return reflect?

A. The tax return reflected a year ago, if my memory is correct, showed that we were $27,000 in the hole, shall we say. We were of course very disturbed about it when that occurred, but we felt confident and I did not have a question in my mind that by the time we got that statement that we had already made a corrective change in the situation necessary to make the change because we were doing something in the neighborhood, I would say, of a quarter of a million dollars a month as far as volume is concerned even though we tried to account for the reasons of it having occurred a year ago, but we were confident that we made corrections to immediately bring it up above.

Q. Did you have your accountants compute any average overhead cost on these jobs?

A. I gave to the Accounting Department a budget that they were to operate on as far as each individual division [18] is concerned and the salaries.

Q. No. What was the percentage of your overhead with relation to your jobs? You said you were doing about a quarter of a million dollars in volume a month. What relation to overhead did that figure have?

A. We figured at the present time or at the time we were in operation at that stage of the development of the business, we tried to restrict the overhead to 50 per cent of our total gross income off of each job knowing that eventually we could

(Testimony of Frederick Millard Rameson.)

with the same degree of overhead of the personnel we were training——

Q. Excuse me for interrupting, but I want to get this straight. In other words, on the house you were talking about which cost $12,800 to build you had a $2000 cushion to take care of overhead?

A. We set that up as a minimum.

Q. You felt your overhead should not exceed $1000 on a $12,800 construction job or about 8 per cent?

A. That is what we tried to hold it to.

Q. Isn't it a fact in the construction industry that runs about 25 per cent overhead?

A. I don't know that to be a fact, sir.

Q. What were your personal drawings from the business during 1952?

A. During that year I believe sometime we finally worked ourselves up to where Bill and I were drawing $1000 [19] a month. When we started we started drawing $300 or $400 a month and gradually worked it up. I believe finally almost all of the last year we were drawing $1000 a month.

Q. Did you also have an expense account?

A. Not separately, sir. Once in a while there was an extraneous cost. When I built the swimming pool for my own house, my house was designed and used as a model home.

Q. Your house was built out of money from the partnership, was it not?

A. No, sir. The loan was scheduled to cover all of the construction. I have a $15,000 loan on my

(Testimony of Frederick Millard Rameson.)

house. It was set up and based so that the lien would cover the full construction.

Q. How much did it cost to build your house?

A. I can't answer that at the moment.

Q. Isn't it true there were a lot of unpaid liens on your house?

A. Not on my house.

Q. Not on your house?

A. No, nothing on my house. That was completed a year ago.

Q. Isn't your house in Hidden Hills?

A. Yes. To my knowledge there were no unpaid bills on the house unless there may be a little financing, a matter of a few dollars of which I have no specific knowledge, [20] but to my knowledge there were no other liens on that house.

Q. Then I guess it is your brother's house that the liens are on. You say you don't know how much it cost to build the house?

A. Yes. That house we designed and was set to basically cost $12,000 to build, but we were trying to be instrumental in the development of the area called the Hidden Hills. We developed quite an extensive advertising campaign based on a way of living in an acre and all that. It involved the building of stables, bridges, chicken houses and finally swimming pools. When I built the swimming pool the loan on my house was increased from $12,000 to $15,000 to cover the cost of the swimming pool. To my knowledge that house was built within its funds. At least it would not be sufficiently dif-

(Testimony of Frederick Millard Rameson.)

ferent from that to call it specifically to my attention.

Q. The partnership furnished you with automobiles? A. That is correct, sir.

Q. What kind of car did you drive?

A. I drove a Ford, I believe a 1951 Ford, sir.

Q. Wasn't there also a Buick?

A. Not of mine, sir. As a matter of fact, I don't think the Buick was owned by the partnership, to my knowledge. I don't think the Buick was owned by the partnership. My brother owns a Buick in his own name, but I don't think [21] there was one in the partnership. To my knowledge there was not a Buick owned by the partnership.

Q. How many automobiles or passenger cars did the partnership have?

A. I believe our ultimate desire was to have one for each salesman, but I believe there were only two as far as automobiles, passenger automobiles were concerned the last time the business was operating. I believe Jack drove one, my brother drove one, and I drove one.

Q. How many trucks did the partnership have?

A. I can't answer that because that is a question for the Production Department. There were several. I don't know offhand. My brother will have to answer that question, sir, because they were all involved in production.

Mr. Slane: I will ask him about that then.

The Referee: Who handled the money? Who

(Testimony of Frederick Millard Rameson.)

was the treasurer? Did you have a treasurer in your organization?

The Witness: No, sir. We had a head accountant who handled it. The actual trucks were bought with no down payment.

The Referee: I am not talking about trucks. Who handled the money in the bank?

The Witness: Our controller, our head bookkeeper, sir.

The Referee: Was he under bond to you?

The Witness: No, sir.

The Referee: Do you know whether he got away with any [22] money or not?

The Witness: No, sir. I trusted him implicitly.

The Referee: I didn't ask you that.

The Witness: I don't know, sir.

The Referee: What is his name?

The Witness: Jack Conrad.

The Referee: How old is he?

The Witness: About 32. I want to qualify that. I worked right with Jack.

The Referee: He handled all of the money and was not under bond. Did any of these people who got you to build houses have a completion bond on the houses so that if you did not complete them the bonding company would?

The Witness: No, sir, we never did.

The Referee: Did you ever advise anybody that it would be advisable to do that?

The Witness: Whenever there was a question in anyone's mind we definitely advised them to go

(Testimony of Frederick Millard Rameson.)

through Builders Control which happened in some instances, but we felt we were in a condition where that was unnecessary, sir.

The Referee: Go ahead. The only smart people I have seen around here are the School Districts who require completion bonds and if the projects are not completed the USF&G completes them.

Mr. Slane: The State laws require it, Your Honor. I have long advocated a revision of the State Contractors' [23] Act of California which would require every contractor when he gets a license to pay a premium to the State Fund, but unfortunately we have been unable to get that legislation passed. If we did we would not be here as often as we are.

The Referee: Go right ahead, sir.

Mr. Slane: Q. Were any funds used to finish a house that were received from a financing institution for the purpose of building any other house?

A. Well, sir, that is a difficult question. Unfortunately, at least I can conclude now they were not kept separate one from the other.

Q. Were they all intermingled?

A. The funds were placed in basically one bank account when received from the jobs. I wish I had kept them separate.

Q. I notice on your schedule here you report some $34,500 worth of outstanding wage claims. What do they represent?

A. They represent the last week or week and a half of production.

(Testimony of Frederick Millard Rameson.)

Q. Your payroll was that much for a week or a week and a half, $35,000?

A. I believe that also included office payroll. Yes, I believe our construction payroll itself was somewhere around $15,000 a week. [24]

Q. Your office was $20,000 a month?

A. No, not payroll, sir. Our payroll, I think, was around $10,000.

Q. For the office. You had 32 private offices out there, didn't you?

A. I never counted them. I didn't count the offices. We had several individual offices, yes, sir.

Q. Then you had a lot of secretaries?

A. Yes, sir.

Q. You had how many divisions altogether?

A. Five divisions, sir.

Q. You had an architectural staff and all the rest of it, so it must have been at least $20,000 a month for the office payroll.

A. I don't believe so. To the best of my ability I think it was less than that.

Q. This $35,000 approximately that you owed in wages was for the last week and a half or two weeks?

A. The majority of that is construction labor.

Q. Were checks outstanding for those wages?

A. Yes, they were, sir.

Q. In other words, you issued these checks without funds being available in the bank?

A. No, sir, that is not a correct statement, sir.

(Testimony of Frederick Millard Rameson.)

Q. What would be correct? The checks did not clear, did they? [25]

A. Before we issued the checks that were based upon that, as far as the ones that were issued, we contacted the lending institutions, the major ones. You see, once we knew there was any problem at all we refused to take in any more payments. In fact, we turned them back so that we were shut off immediately without any funds. It was suggested by the Receiver. You see, when I got the information on Friday, the following Monday immediately as soon as I knew the problem, I went to the two major lending institutions and laid all of the facts right clearly before them, and the following Wednesday, two days following, I laid all of the facts completely before the major creditors.

Q. You called a meeting of some eight or nine major creditors?

A. Yes. They had no knowledge of any problem just as the lending institutions did not, but as soon as I knew we were in a dangerous position I called them in and the creditors. The creditors formed a committee and upon their advice and counsel, in those few days we continued, we did not shut off production in the field which was not only our own decision to continue production, but it was also the general counsel of the creditors.

Q. That is not answering the question.

A. I am sorry.

Q. The question had to do with the issuance of payroll [26] checks that bounced.

(Testimony of Frederick Millard Rameson.)

A. I will finish answering that. I am sorry. We assured ourselves when we issued the batch of payroll checks that were stopped. I don't think they bounced.

Q. This payment was stopped so that the recipient of the check did not get the money?

A. That is right.

Q. There was no money in the bank to pay them?

A. That was not our general procedure.

The Referee: Answer the question directly. I think you talk too much.

Mr. Slane: Q. Was there money in the bank when you issued the checks to pay labor?

A. There was no cash in the bank.

Q. Another item in the schedules is taxes due the United States $30,379. That represents primarily withholding tax, does it not? A. Yes, sir.

Q. How far back does that go?

A. Just that current quarter.

Q. Did you pay the second quarter of 1952?

A. We paid the last time it was due, sir.

Q. Were you depositing regularly with the bank as required by law the funds to take care of the withholding tax?

A. I understand that was not done in the two months [27] prior to this action.

Q. You ceased doing that as of July 1, is that correct? A. I don't recall exactly.

Q. There were no funds deposited for the third quarter? A. That is correct.

(Testimony of Frederick Millard Rameson.)

Q. Then you must have been aware of this condition that early, weren't you?

A. No. I was not aware of the fact that we were in financial difficulty.

Q. Didn't you think things were serious when you didn't put enough money away to comply with the withholding tax?

A. Unfortunately it was wrong, but the major reason we were cramped as far as working capital is concerned or capital turnover was concerned was because of the fact we took over too rapidly our own cement company, electric company, and other units that way, that we formerly operated on a subcontractor basis. We paid one bill in its entirety to a subcontractor and we took over several organizations ourselves and we had to pay out the dollars earlier, more quickly in the form of wages. We felt or I felt the cramped position we were in because of that was due because of that perhaps wrong business judgment in taking over these organizations too fast. [28]

Q. When did you buy the property where the business is located?

A. I don't recall the exact date, but it was approximately a year and a half prior.

Q. Do you recall how much you paid for that property?

A. I believe the land itself was $87,000.

Q. How much did you pay down?

A. The original negotiations were based upon 10 per cent and increased to 15 per cent down.

(Testimony of Frederick Millard Rameson.)

Q. You paid down 15 per cent?

A. Yes, sir.

Q. Then you proceeded to build an office building?

A. After a period of time we proceeded to build an office building.

Q. Do you recall approximately what that cost you?

A. We built it in various stages. When we started our intent and purpose—well, directly answering your question I can't say exactly. I know approximately it ended up at about $42,000.

Q. Some $40,000. Then you also built a warehouse building? A. That is correct.

Q. How much did that cost, approximately?

A. I believe around $12,000. I don't know exactly because it went in stages of construction. We were only building it as we needed it. [29]

Q. Those funds were taken out of the business. There was no additional financing arranged to complete those buildings? A. That is correct.

Q. At the time of bankruptcy you owed approximately $71,000 on that property?

A. Yes, sir.

Q. Those were trust deeds held by Mr. Duff?

A. That is right, sir.

Q. You list in the schedules a considerable number of other trust deeds totaling some $180,000. Here is one for example to Edwin Steinkamp for $4000. Do you know what that would be for?

A. We bought several pieces of property from

(Testimony of Frederick Millard Rameson.)

Mr. Steinkamp without any cash consideration. We would take a second mortgage for the entire cost of the land.

Q. He would deed you the land, is that it?

A. That is correct, sir.

Q. Then you would go to the Cal Federal or some other financing institution and borrow on the first trust deed the estimated cost of construction?

A. That is correct, sir.

Q. After that was completed you would go back to the original seller and give him a second trust deed on the property?

A. They usually filed that directly following the transaction. [30] They filed it directly following the first. That was the general practice. They did not wait until title was finished.

Q. Title stayed in Rameson Brothers?

A. That is correct.

Q. At what basis was the figure for the evaluation of those lots?

A. That was a bargaining position between myself and Mr. San Campo.

Q. Was any outside appraisal of those lots made?

A. No, sir. I felt I was in a position to appraise the value of the property myself without subjecting it to outside appraisal.

Q. I notice one here for San Campo where you have $10,500. Apparently that was what the lot was supposed to be. A. Yes, sir.

(Testimony of Frederick Millard Rameson.)

Q. $20,800 was Cal Federal. Apparently that was the cost of the building?

A. That is correct.

Q. A total of $31,300?

A. That is correct.

Q. Who got the profit there? A. We did.

Q. San Campo did not? A. No. [31]

Q. I think this was a house on Stradella.

A. Yes.

Q. How did you arrive at the value of the lot to put the figure in here?

A. It was established not only from the physical value of the property, but also was valued according to the program we developed with Mr. San Campo. We were going to open two model houses together since he opened one on Stradella. It was a sales campaign, a construction relationship existing between Mr. San Campo and ourselves which put an intrinsic value on the location.

Q. That location may not have been worth $10,000?

A. I think it was fairly worth $10,000 and it would be subject to outside appraisal. It was a very fine piece of property.

Q. Mr. San Campo planned on making considerable profit out of that transaction? A. Yes.

Q. And his profit would have to be included in the second trust deed?

A. He always makes a profit, not considerable profit. He makes whatever profit he makes on the sale of each individual property.

(Testimony of Frederick Millard Rameson.)

Q. Do you have any idea what the lot cost Mr. San Campo?

A. I believe he bought the lot and completely subdivided [32] it himself. I have no knowledge of what the lot cost Mr. San Campo.

Q. How many of these speculative houses did you build?

A. I believe we had some eight under construction at the time.

Q. That was during the time of bankruptcy, but how many did you build prior and finish and sell?

A. We usually liked to keep three or four on an average under construction at any one time.

Q. That is not answering the question. How many were there? Would you say there were ten, twelve or fifteen?

A. I would say ten, sir.

Q. You would say ten? A. Yes, sir.

Q. What did your cost accounting show as to your profit or loss on the ten you previously built and sold on speculation?

A. I cannot specifically answer that question, sir, but most of them were built for two purposes. This should be relevant to your question. They were built not only for the purpose of making a profit on the house, but the primary purpose was to use the house as a model or illustration which might be experimentally valuable to us on the houses under construction that we could illustrate the different houses that we would sell on the market. [33]

Q. Wouldn't it be more valuable to you to make

(Testimony of Frederick Millard Rameson.)

a profit than to have a lot of houses sitting around? Actually isn't it true you didn't know whether you made a profit on any of these or not because you don't have the figures showing them in your records?

A. In my memory at this moment I do not, sir, but I presume they are in the records.

Q. You never sat down actually and analyzed a particular house and said that it cost $24,000 and sold it for $20,000 and got $6000?

A. That is true.

Q. Compared each house and how much profit you received?

A. You are asking for information. For example, take the Fireside House. I am sorry, sir, but without looking at the figures that were exposed to me at the time, I can't carry the figures in my memory at the present moment.

Q. What is the normal ratio between the cost of the lot and the cost of the house which you put on the lot? In other words, there is a yardstick that is generally accepted in the construction industry, isn't there?

A. It is sometimes spoken of, but in our way of thinking and it seemed to me the general line of opinion in Southern California, especially in all of the districts we built in, that that yardstick applied throughout the country of 25 per cent was not applicable here. I believe [34] it was not basically applicable here. The value of property is usually higher in proportion.

(Testimony of Frederick Millard Rameson.)

Q. You are saying that you feel it should be more than 25 per cent? A. Not exactly.

Q. Of the total cost of the lot itself?

A. I am not saying it should be. I am saying it is the way it generally works out here now.

Q. Don't you think on a deal like this, up on Stradella, where a lot is $10,500 and the house costs $22,500, that is just about 33 per cent of the total project being in the lot?

A. Our normal sales price would be different. You are talking about cost and sales price.

Q. Do you know what it cost to complete that house? What would it cost to finish the house?

A. It should have cost $20,800.

Q. You want the actual figures? $34,500.

A. The cost of construction, sir?

Q. Yes, sir, taken from your own records.

A. I challenge that figure.

Q. I will tell you how the figures were arrived at, from your records showing what you paid out on the job in wages and material plus what the ledgers show to be unpaid bills on that job. There is an estimate of your superintendent that in order to finish the job it will cost $34,500. [35]

A. That doesn't amount to the cost of construction.

Q. Oh, yes. That takes into consideration nothing for overhead.

A. I don't believe that is quite so, sir.

Q. It is taken from your records.

(Testimony of Frederick Millard Rameson.)

A. Mr. Johnson, is that a correct analysis of that particular set of facts?

Mr. Johnson: I don't have a breakdown of it. I don't have the sheets with me.

The Witness: We had a discussion in our office with regard to that particular set of facts and we concluded that was wrong.

The Referee: Before you started in business did you have any experience in building anything?

The Witness: No, sir.

The Referee: From a chicken coop on up to a kite? You started in without any knowledge of the building industry at all?

The Witness: I had built two or three houses prior, or a few houses actually prior to this.

The Referee: You mean you were employed by someone to build them?

The Witness: No.

The Referee: Did you finance two or three houses before?

The Witness: Yes, sir. [36]

The Referee: In other words, you started from scratch in this thing, apparently and didn't know anything about the building business and didn't know how to keep up with the financial status. Isn't that true? You sat there and took in money and didn't know what happened to it. All right, sir.

The Witness: We didn't know that was the case.

The Referee: That is the way it impresses me.

Mr. Slane: Q. What is your educational background, Mr. Rameson?

(Testimony of Frederick Millard Rameson.)

A. I went to Los Angeles High School, sir. I went to the University of Southern California. I took my undergraduate work before the war. I took my B.S. I was in the war approximately three years. Then I went back to the University of Southern California and took my Bachelor of Law degree.

Q. Did you graduate among the top five in your class?

A. I don't know if it was that high.

The Referee: What is that?

Mr. Slane: I understood he was one of the top five men in his class at the USC Law School.

The Referee: Were you admitted to practice?

The Witness: No, sir, I wasn't. At that time I had to make my decision. I had already started a little building prior to that time and I made my decision prior that building was my life work and I made my choice then, sir. [37]

Mr. Slane: Q. But you are a graduate of USC Law School? A. That is correct.

Q. As such you are familiar with the laws and procedures in general and with business transactions? A. Yes, sir.

Q. How about this boat that you had?

A. We bought a 25-foot '41 boat for $2800 approximately with a little less than $1000 down payment.

Q. Is it a Chris-Craft? A. Yes, sir.

Q. Was that bought by the partnership or by you individually?

(Testimony of Frederick Millard Rameson.)

A. It was bought by me individually, sir.

Q. What became of the boat?

A. We sold it as soon as we knew this situation was pending.

Q. The funds were turned over to the assignee?

A. Yes, sir.

Q. You got the purchaser, but the assignee actually sold it?

A. At the time the sale was consummated we were in assignment.

The Referee: Who was the assignee in this case?

Mr. Slane: Mr. James Dean of the Building Material Dealers Credit Association. He was temporary assignee. When the situation became apparent it was placed in bankruptcy. [38]

Mr. Taylor: By way of explanation, if the Court please, that lasted about a month, from about September 20 to October 20.

The Referee: The assignment?

Mr. Taylor: The assignment. Then they threw in the sponge and the involuntary proceedings started.

The Referee: It was about time for that sponge to come in from the way it looks here. Proceed.

Mr. Slane: Q. You had some approximately thirty private offices in the building you built?

A. They were divided up into quite a few different cubicles.

Q. Thirty different rooms?

A. I have not actually counted them, but there were quite a few.

(Testimony of Frederick Millard Rameson.)

Q. There were thirty-two, if I remember correctly. They were all furnished?

A. Yes, sir.

Q. Your offices were furnished with a very fine type of furniture, is that correct?

A. We thought it was good, sir.

Q. Exceptionally good. You had a beautiful lobby with a fireplace and you even had a fireplace in at least one of the private offices. Was that your office? A. My brother Bill's office.

Q. And also a private bathroom for that office?

A. Yes, sir. It was rather an outstanding feat of architecture, we thought. Our purpose was to display the good quality of what we represented as far as building was concerned, which we felt was necessary in order to have good architectural design.

Q. As to your personal assets, Mr. Rameson, what personal assets do you have? You had this home in Hidden Hills or an equity in it?

A. Yes, sir.

Q. And the furniture? A. Yes, sir.

Q. Did you have a car of your own?

A. Yes, sir.

Q. What kind of car was it?

A. It was a 1949 Ford, or 1950 Ford, I am sorry.

Q. That was your own personal car?

A. Yes, sir.

Q. Do you still have that car?

A. No, sir. That was in the individual name of my wife and myself and due to the fact that we

(Testimony of Frederick Millard Rameson.)

had hospital expenses something immediately had to be done about our equity in that car and it was sold.

Q. You used that money for living expenses?

A. Yes, sir.

Q. I believe you have a baby about eleven days old, is that correct? [40]

A. That is correct, sir.

Q. What other assets did you have personally?

A. I had none, sir. Everything I had was in the business.

Q. You had no stocks or bonds?

A. No, sir.

Q. Did you have a personal bank account?

A. Yes, sir.

Q. In what bank was it?

A. The same bank as the business account, the Security First National Bank at Pico and Oakmont.

Q. Did you have a safety deposit box?

A. No, sir.

Q. Any trust deeds? A. No.

Q. In your own name. I know some are listed in the partnership.

A. Just as a part of the partnership assets.

Q. Just in the notes listed in the partnership. They are the only notes you had any interest in?

A. That is correct, sir.

Q. Are you expecting any inheritances from any estate now in the process in the courts?

A. I have no knowledge of any, sir.

(Testimony of Frederick Millard Rameson.)

Q. You also had some horses, I believe?

A. That is correct, sir. [41]

Q. How many?

A. I had two, sir. They were bought on time. They were good horses.

Q. How much did you pay for them?

A. The total consideration was $1800. They were Arabian horses. I had paid $300 on them.

Q. Did you turn them back? A. Yes, sir.

Q. Did you have any other livestock?

A. A few chickens, sir, but that was all.

Q. Television? A. Yes, sir.

Q. Do you still have it? A. Yes, sir.

Q. Is it paid for? A. Yes, sir.

Q. There were some skilsaws that belonged to the partnership according to the records out there. Were they given to Jack Conrad?

A. I believe all the equipment was turned into Mr. Johnson and Mr. Sheedy, sir.

Q. These were not. They disappeared before they took possession.

A. I have no knowledge of any equipment not turned in. I thought it was turned in.

Q. What happened to the Ciota Pipe machine?

A. I am sorry I don't know what it is exactly.

Q. It is a pipe machine that cost around $700. It was almost brand new. That also disappeared.

A. I don't know of the existence of it, sir.

The Referee: How old a man are you?

The Witness: Thirty years old, sir.

(Testimony of Frederick Millard Rameson.)

The Referee: When did you graduate from SC?

The Witness: Approximately three and a half years ago, sir.

Mr. Slane: Q. Among other things there was a typewriter, also, missing out there. Do you know where it might have gone. According to the records there is one typewriter missing.

A. I didn't know there was any equipment missing. I thought all the equipment was recovered.

Q. The missing equipment includes a typewriter, pipe machine and skilsaws. Do you know what they are?

A. Yes, sir, but I don't know of any missing equipment of my own knowledge.

Q. I don't mean to infer that you personally got it. A. I understand, sir.

Q. But do you know of anyone else who might have taken it?

A. No, sir. I have no knowledge of the whereabouts of any missing equipment.

Mr. Slane: I think that is all at this time from this [43] witness, Your Honor.

The Referee: You may stand aside. Whom do you want next?

Mr. Slane: I would like to call William Rameson.

Mr. Taylor: Your Honor, if you would permit me for one moment I would like to fill in this picture a little bit perhaps and by so doing save the Court's time.

The Referee: What is it?

Mr. Taylor: This office is just inside of the City boundary limit of Santa Monica and immediately abutting Olympic Boulevard. From the time that this assignment to the creditors started there was a marshal from the Municipal Court placed there by virtue of an attachment issued out of that court. As I understand it, he was there for about two weeks. Is that right, Mr. Slane?

Mr. Slane: I would say about ten days or two weeks.

Mr. Taylor: During that time he was at the front door while the back of this office was open and the warehouse under lock, but to which lock at least twenty-five people had the keys to. These items he mentioned are all that appear to have been missing from the personal property. As Your Honor knows, skilsaws are attractive implements to many people, and that includes me, but I didn't know about them at the time. I believe that will account for the fact that these few items are gone. I believe the inventory will show that there was perhaps $30,000 worth of personal property [44] out there that was movable.

The Referee: In other words, twenty-five people had an opportunity if they had the desire to take these articles?

Mr. Taylor: That is correct.

Mr. Slane: Quite a number of these saws are on jobs.

Mr. William Rameson: That is what I would like to clarify.

WILLIAM W. RAMESON

having been first duly sworn, called as a witness on behalf of the Trustee, testified as follows:

Direct Examination

Q. (By Mr. Slane): Will you state your name, please? A. William Rameson.

Q. You are one of the partners in Rameson Brothers? A. That is correct.

Q. They are involved in bankruptcy?

A. Yes, sir. I would like to explain the situation about the skilsaws, if I may.

Q. Go right ahead.

A. The skilsaws were in their entirety out on various jobs. I guess there were approximately about 44 houses under construction. They were all in various stages [45] of construction. The men had the skilsaws out there as far as the designees were concerned, and as far as finding out about these things, with the difficulties the company was in, as you can well realize there was pandemonium as you know from experience considering the reactions that men have. Their reactions were: "Where is my money?" And they all came swarming in all at once. I tried my best to explain the situation and tell them everything about it. As far as the skilsaws are concerned, I firmly believe at the moment that quite a proportion of the skilsaws, if not all of them, are in the hands of the men by whom they were being used at the time. Those skilsaws are worth anywhere from $50 to $80 and the men's checks were all represented in terms of $50 and $80

(Testimony of William W. Rameson.)

or some figure like that. It is my feeling and belief that those men are retaining the saws more or less as security or to make sure they will get their check. They don't know anything about the law or the fact there is a court of law. All they know is they need their money.

The Referee: Are those things power driven?

The Witness: Those things are power driven. As far as they know, they got something in their hands. I can see their point. They say, "This guy owes me $50 or $80. I am going to keep the saw until I get a check and then I will turn it loose."

The Referee: They will have to turn them loose.

Mr. Slane: Q. Do you have any idea who those people might be? A. No, I don't.

Q. You have no personal knowledge where they went? A. No.

Q. As to the Ciota Pipe machine, what is the story on that?

A. That was brought to Rameson Brothers by Tom Donaldson. If there is any reimbursement to Tom Donaldson for the pipe machine I don't know about it. There may have been, but it is my belief he was never reimbursed for it. He brought it over for us to use.

Q. Your records show it to be the property of Rameson Brothers?

A. I don't know how it got that way, but at the time he brought it over there the personal conversation that went on at the time was that he was bringing it to us to use.

(Testimony of William W. Rameson.)

Q. What is the exact status of Tom Donaldson?

A. Tom Donaldson was a separate subcontractor, but if you want to turn it around—we had the union to watch out for; we didn't want to offend the union, we didn't want to offend the State, and we tried to find a middle road, and the best way to find a middle road was to hire Tom Donaldson as a separate subcontractor, but instead of giving him something for this size job and something for [47] that size job, inasmuch as we had various jobs under construction, we decided to pay John off per month.

Q. Wasn't he to receive a percentage of the funds as profit?

A. To my knowledge that never existed.

Q. The accounts with the wholesale company were listed under Rameson Brothers and Donaldson, is that right?

A. Yes. That was because the wholesale plumbing supply houses will not sell to a general contractor.

Q. That is right.

A. But they will sell to a plumbing contractor. A plumbing contractor, in case his credit is no good, can get the general contractor's name to go along with. So the way the whole thing ended up was that everybody was satisfied, the union was satisfied, the State was satisfied, the wholesale plumbing supply houses and Tom Donaldson were satisfied if we charged it to Rameson Brothers and Tom Donaldson.

(Testimony of William W. Rameson.)

Q. You understood, of course, that Tom Donaldson's credit was no good?

A. No, but I knew also he had some bills to pay. I thought he was paying off the bills.

The Reference: Was he a union boss?

The Witness: Not that I know of.

Mr. Slane: Q. He was a master plumber, is that right? A. That is correct. [48]

Q. He had union plumbers working for him, is that right? A. That is right.

Q. But he himself was not a member of the union. Well, you don't know the answer to that, but you can't be a member of the union if you are a master plumber.

A. You know more about that than I do.

Q. Is your brother's version substantially correct about the boat? A. What is that?

Q. About buying the boat?

A. We had a boat that we were supposed to use for entertainment of customers. That was the reason the boat was bought. A lot of these things you speak about may seem to be extravagant in some cases, but you have to do it if you want to sell 44 houses every month.

Q. Approximately how much were you spending a month for advertising?

A. You are going out of my precinct.

Q. In other words, you did have a regular monthly statement, a profit and loss statement that broke down the various items, so much for advertising, so much for entertainment, and so on?

(Testimony of William W. Rameson.)

A. My job was to build houses and to build houses on the money allotted for that purpose.

Q. Did you build them with the amount of money [49] allotted for that purpose?

A. I think I did a very good job of building with the amount of money allotted for them.

Q. How do you account for this tremendous deficit?

A. Because you picked one house that was an experimental job. If you will check through the records on the majority of houses you will find I did build them for the actual amounts. I am talking about the actual money that went to pay the plasterer, for lumber and plumbing. I am not talking about the amount of money it took to put them in the paper. I am talking about the money for plastering and plumbing, and I did exactly that.

Q. You are saying that your actual construction was pretty near a break-even deal and that the loss came about by all of this expensive front?

A. Inasmuch as I am on the stand, I don't want to make a statement as to what I think it is because I really don't know what it is. I am in exactly the same boat. I know what Fred said on the stand. We were unaware we were in the hole. We thought we were doing a good job. All of a sudden when we found out we were not doing a good job we immediately did what we thought was right and honest and immediately notified all parties concerned.

Q. How many houses did you have under con-

(Testimony of William W. Rameson.)

struction or unfinished at the time of this assignment? A. Approximately 44. [50]

The Referee: Q. To what degree of completion would the average be, one-half?

A. About half.

Q. About half?

A. We were just going right along as we were supposed to do as far as construction was concerned.

Q. What would be the average cost of completion?

A. The average cost of the houses would probably run in terms of about $17,000 or $18,000.

Q. Not one of them had a completion bond on it? A. That is correct.

The Referee: What is next, Mr. Slane?

Mr. Slane: Q. I take it your testimony would be approximately the same to every one of the questions I asked Fred? A. That is correct.

Q. Therefore I don't feel it is necessary to ask you a lot of those questions. A. Thank you.

Q. Did you have any dealings directly with the financing institutions yourself?

A. I knew enough to say "Hi, Dick."

Q. Did you sign any of the papers necessary to secure the release of any funds from any of the financing institutions?

A. To my knowledge and belief I don't know.

Q. You don't remember signing any?

A. I don't know. I might have.

(Testimony of William W. Rameson.)

The Referee: Q. How much did these finance companies charge you as interest, do you know?

A. I don't know the answers on financing.

Q. Do you know whether or not any of them charged you a bonus?

A. I am sorry, sir, I don't know that. I don't know anything about it.

Q. One of the biggest firms in town—you hear them on the radio every fifteen minutes—someone was in my office recently and told me they wanted him to pay 6 or 8 per cent bonus on $8000 or $10,000.

A. I see what you mean. No, we never paid any bonus that I know of.

Q. He took his hat and coat and went out.

A. No. I will say this, the financing institutions have been very fair, as far as I know. They wanted our business and we wanted theirs. Everything has been mutual. This whole thing just exploded.

Q. I signed a check yesterday for one loan company for 18 per cent on a $5000 loan.

A. I believe all of our financial arrangements have been in accordance with what is considered strictly on the up and up.

Mr. Slane: We find no evidence of any bonus being paid [52] in these cases, Your Honor. If it was then it was done in a manner not reflected in the records. I don't think there was any in this case.

The Referee: I am sure I don't know. I am telling you what my friend told me.

(Testimony of William W. Rameson.)

Mr. Slane: Q. Getting back to your personal assets, Mr. Rameson, what did you have personally at the time you filed your personal bankruptcy? Did you have your home in Santa Monica?

A. My home in Santa Monica, that is correct.

Q. That is not free and clear?

A. That is not free and clear.

Q. There is a trust deed against it?

A. Yes.

Q. You have a few liens against it?

A. I believe the amount against the home is approximately the value of the house.

Q. Was money taken out of Rameson Brothers to do that construction work, remodeling job, or did it come out of personal funds?

A. There is a large degree of that which came from the sale of my house over in Leimert Park.

Q. Which you had previously owned?

A. Which I had previously owned long before I even went into the business or anything else.

Q. What was your business or occupation prior to the [53] formation of this partnership?

A. Engineering, sir.

The Referee: What sort of engineering?

The Witness: Aircraft engineering, designing.

Mr. Slane: Q. You had been employed by one of the aircraft companies for a number of years?

A. North American, ten and a half years.

Q. You saved up money in order to own your own home? A. Well, I was hoping to.

Q. You were hoping to?

(Testimony of William W. Rameson.)

A. That is correct.

Q. You put some money into this transaction to start this partnership? A. That is correct.

Q. How much did you put in, do you recall?

A. No, I don't recall. The reason neither my brother nor myself recall is because it was not like buying a business. It was putting in a few hundred dollars now and putting in a few hundred dollars later. The records of the company should show how much each one of us put in.

Q. In addition to your home in Santa Monica, you have the normal household furnishings, I suppose? A. That is right.

Q. Did you have an automobile?

A. Yes, I had an automobile. My wife and myself had an automobile. [54]

Q. You had a car belonging to Rameson Brothers?

A. No. I had a car that belonged to William W. Rameson.

Q. Yourself personally?

A. For which I had paid for out of my normal take-home drawings.

Q. What kind of a car was it?

A. A 1950 Roadmaster bought secondhand.

Q. Buick? A. Yes.

Q. That is where the Buick came in. Do you still have that car?

A. No, sir, I don't have that car. I am sorry. We had two Buicks. One is a Roadmaster and one is a Special. The Roadmaster was in my wife's

(Testimony of William W. Rameson.)

name and myself, but the Special was in my name alone. That Special was turned over to the bankruptcy deal for liquidation in cash, I believe, in this Court, although I am not sure.

Q. The other car belonged to you and your wife?

A. The other car belonged to my wife and myself, but inasmuch as I had no income since October, I had no money and I had to have money to live on while the assignment was going on. The peculiarity of a partner is that he has to be around to help out and can't get money either, yet with four children and a family I had to have money to live on. That is where it went. [55]

Q. Did you sell the car or did you borrow on it?

A. I borrowed on the car before bankruptcy.

Q. Before the bankruptcy was filed?

A. That is correct.

Q. Do you still have the car? A. No.

Q. You sold it?

A. Oh, yes, I sold it. There was only about $200 equity in it. I was living on the amount of money borrowed.

Q. What other assets do you have?

A. The amount of assets I have, as far as I know I have them all listed. I am trying to think. I don't own any stocks or bonds.

Q. Any savings accounts?

A. No, nothing in respect to anything like that which you would normally pick up except I am trying to live.

Q. Do you have some acreage?

(Testimony of William W. Rameson.)

A. I am sorry. I have that. I will turn it over to you.

Q. About seven acres? A. That is right.

Q. Where is it located, in Calabasas?

A. In Calabasas on Ventura Highway.

Q. What is the estimated worth of that?

A. It is hard to estimate its worth inasmuch as I paid $5,750 for fourteen acres of property. [56]

Q. $5,750?

A. Approximately. I use the word approximately as long as you have me up here. $5,750 is what I think it is. The State came through and cut off 7 acres when they put a road through.

Q. It is right on the new highway?

A. It is right on the new highway. So what is it worth?

Q. I don't know myself.

A. I don't know either.

Mr. Taylor: They cut through it and raised the highway so that the land is down below the highway and half of it is gone. That is why it was put in the assets. It is hard to estimate. I will have to be guilty of that, Your Honor.

The Referee: If they keep on building freeways there will be no houses left.

Mr. Slane: Q. You probably got adequate compensation from the State of California for taking 7 acres of your land?

A. Yes, but I think you will find that compensation was in the company assets.

Q. In other words, when you got that money

(Testimony of William W. Rameson.)

from the State you put it into Rameson Brothers Company?

A. You will find that is where it ended up.

Q. Do you remember how much you got from the State. [57] With your stepfather being an attorney, you must have done all right.

A. We didn't do very good. It was somewhere about $3200. Then it ended up where I got about $4200 or $4500. I don't want to say exactly because I don't remember. It was running back and forth from nothing to $4000 or $4500.

Q. Do you have any other assets that you recall? Do you have any notes or trust deeds?

A. I have nothing like that.

Q. Except the ones listed as partnership assets?

A. I have nothing, sir.

Q. Do you have a bank account?

A. I never had a chance to raise money. I had another baby. I have four children now.

Q. Do you have a bank account?

A. Yes, but it was immediately depleted in trying to live.

Q. What bank did you have the account?

A. Security First National, West Adams Branch. It was $200 or $300, something like that.

Q. Is that the only bank account you or your wife had?

A. That is the only bank we did business with so that the bank accounts can be found there.

Q. Do you have any life insurance? [58]

A. I have life insurance which I took out ap-

(Testimony of William W. Rameson.)

proximately two or three months before all this happened. I had some life insurance at North American which became null and void because it was group insurance. When I transferred out of North American I had to refinance my insurance with another firm. I took out an insurance policy there so that policy is only the age of the business itself. Then the insurance man tried to figure out with me three months before this how to do it, so he lined up the insurance and the insurance company is listed on my insurance deal. Due to the youngness of the insurance policy the insurance equity or whatever you call it, the cash-out value, was negligible.

Q. How much insurance do you have?

A. I don't know what it is in dollars and cents. What I had the insurance policy carrier do was to hook it up so that dealing altogether in the basic insurance it would amount to $400 per month for life if I should die for my wife and the children.

Q. Was it $40,000 worth or how much?

A. I was never informed of the total value. I bought it strictly in accordance with how much it was per month.

The Referee: Do you pay an annual premium on it?

The Witness: I pay monthly or I had it bimonthly. The reason I am not sure of the answer is because my wife [59] knows about the policy. She pays our bills. I don't pay the insurance. We recently had it changed to monthly.

(Testimony of William W. Rameson.)

The Referee: What is the limit now, seven and one-half? Didn't they raise it recently to $700 or $750? Some of you lawyers should know the answer to that.

Mr. Slane: I can't answer that question. I should know, but I don't.

The Referee: Will your annual premiums equal $500 a year?

The Witness: They are more than that.

Mr. Taylor: The difficulty is this, and the reason the list was made as it is, Your Honor, most of this is term insurance and it has no cash or surrender value.

The Referee: That is another story. I thought the Legislature raised the limit to $700.

Mr. Taylor: They raised the homestead to $7500.

The Referee: That is correct. They are raising everything except our salaries.

Mr. Slane: Q. Did you borrow $10,000 from your father-in-law right at about the time of bankruptcy?

A. As far as that $10,000 is concerned we tried to see what we could do about alleviating the situation right at the last, right at the very last, I mean when we were aware of the thing, at the same time we called the assignee in and all that. My father-in-law offered to loan me that money. When I found out it would do no good we [60] returned the money.

Q. In whose possession was the money at the time the bankruptcy was filed?

(Testimony of William W. Rameson.)

A. The money was never actually reached—it never reached me or the partnership.

Q. You mean you never received it from your father-in-law?

A. I never actually got the money.

Q. What do you mean by actually? Will you explain that?

A. The money was put into trust, trying to be helpful.

Q. Where was the money placed in trust?

A. The money was placed in trust with my lawyer.

Q. Do you mean Mr. Taylor? A. Yes.

Q. When did he receive the $10,000?

A. That I can't answer.

Q. Was it the day of bankruptcy?

A. I don't know whether I can really answer that question.

Q. You don't know when he got it?

A. I am sorry, I don't know.

Q. You don't know?

A. That is something I don't know the exact date.

Q. You should know the answer to it, Mr. Rameson. [61] A. I just don't remember.

Q. I am trying to clear it up.

A. The money didn't actually arrive to my control at any time.

Q. But the money was placed with Mr. Taylor?

A. To see if he could do something to help.

(Testimony of William W. Rameson.)

Q. Was there any written document in connection with it?

A. The only written document made in connection with that was the second trust deed that was put in to guarantee it in case it had to be used and when it was found out it could not be used——

Q. What property was that second trust deed on?

A. That second trust deed is against my property.

Q. The house where you now live?

A. That is right. That second trust deed was immediately removed as soon as it was found out it wouldn't do any good. In other words, it was cancelled out.

Q. When was the money returned to your father-in-law?

A. (No answer by the witness.)

The Referee: Do you know the answer to that?

The Witness: I don't know.

The Referee: He says he doesn't know.

The Witness: I am trying to build up a fabrication—I will take the word out of the record. That is not a fabrication. I am trying to answer the question as best [62] I can.

Mr. Slane: Q. Do you know if it was before or after the filing of the bankruptcy?

A. I don't know, I am sure.

Q. We can get that from Mr. Taylor, but the money was turned over to Mr. Taylor for your use?

(Testimony of William W. Rameson.)

A. No. Wait a minute. I want to get the right word.

Q. What were the instructions to Mr. Taylor, if you know? A. I don't know.

Q. Was there a transaction with your sister-in-law or your brother's sister-in-law?

A. My sister.

Q. Your sister?

A. My sister has a full-fledged second trust deed on my brother's house which was put there and the money was put into the business to try to do some good.

Q. How much was that? A. $10,000.

Q. When was that loan secured?

A. That was all done before the entire transaction. It was done before bankruptcy. It was done right at the very minute or right at the time we were trying to do some good at the beginning of the assignee.

Q. In other words, some time in September?

A. Yes, it would have to be in September because that [63] was when we were trying to do some good.

Q. You called the first meeting about the 9th or 10th of September. I don't remember the exact date.

A. I don't know the date of it, but it was all in accordance with the way it should be there.

Q. You actually received from your sister $10,000?

A. It was immediately used to pay bills.

(Testimony of William W. Rameson.)

Q. That was put into the company bank account?

A. That was put into the company bank account. It should show by deposit in the bank account when the $10,000 was deposited, as of that date.

Q. It was her personal check?

A. Well, I think so. I don't know. Anyway, the money came from her.

Q. So that we can identify it on a deposit slip.

A. It should be an even amount of $10,000.

Q. What is her name?

A. Mrs. John Hull.

Q. I believe the record does show such a trust deed in existence. Are you familiar with what happened to the typewriter and some of the other things?

A. Inasmuch as I have been in and out, you know from your experience I have been in and out trying to help where and how I could. The typewriter, I think, has been filched.

Q. In other words, you think somebody borrowed it?

A. I think somebody permanently borrowed it, but I [64] don't know who.

Q. Do you know what happened to the fireplace equipment in your reception room out there?

A. I don't know.

Q. That disappeared during the time the marshal was in charge, is that right?

A. I don't know whether it disappeared. I don't know whether you even sold it. I know the type-

(Testimony of William W. Rameson.)

writer was stolen because I was asked about it.

Q. It was not there when the Receiver took possession of the property and it was there the day before.

A. I didn't know anything about the typewriter. I think the typewriter has been physically stolen.

Q. Were there any building material supplies or plumbing supplies taken down to your place from the plant there?

A. Yes. The supplies that were taken down from the plant are some degree of pipe mentioned and it is sitting out in the front yard untouched, the way it was. It was assigned to the house to put in a sprinkling system.

Q. Are there any other fixtures such as bathtubs or anything like that?

A. No. I have in my possession at the moment a broken toilet, broken on arrival at my place for installation in my house. I mean it was broken in the package. I don't know where they got it from, from Crane, Lord and [65] Babcock or Which-a-ma-doodle. I still have the broken toilet in the crate.

Q. You don't know who broke it?

A. It was broken on arrival.

Q. You should get credit for it or the bankruptcy estate should.

A. That is right. It is still sitting there in the package.

Mr. Slane: I believe that is all. There were some other attorneys who said they were going to be here

representing other creditors for the purpose of examination, but they are not here. I think we should continue this to give them an opportunity at a future time to come in and examine these people.

The Referee: I have quite a heavy calendar. These attorneys had notice of it. If they came in they would probably go over the same ground you have.

Mr. Taylor: May I say something, Your Honor?

The Referee: Yes, sir.

Mr. Taylor: As Mr. Slane can state, there were at least two very large meetings attended by two or three or more hundred creditors. At one of them we had about 300 creditors. We thrashed matters out officially then. As I said before, there was an assignment which took up approximately a month in time and they were all apprised of these matters.

The Referee: There will be no continuance. I have too much to do to wait on dilatory attorneys. Do you want to ask Mr. Taylor about the $10,000?

Mr. Slane: Yes, Your Honor.

PAUL TAYLOR

called as a witness on behalf of the Trustee, having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Slane): Mr. Taylor, you are an attorney at law? A. I am.

Q. You represent the Bankrupts in this matter?

A. I do.

Q. Are you familiar with the $10,000 transac-

(Testimony of Paul Taylor.)

tion which was referred to a moment ago by Mr. William Rameson? A. I am.

Q. Will you tell us just what that was?

A. At the time this assignment was just about either to be made or in the process of making or immediately effective, there were threats of physical violence against these two brothers. Mrs. William Rameson went to her father and procured in a hurry a loan from him, witnessed by a note for $10,000 and secured by a second trust deed upon the property, and with knowledge of the prior $22,500 trust deed,—which sum of money was by her in the form of [67] a check delivered to me and by me with her father-in-law's instructions put into a trust for the purpose of preventing violence, if it was necessary to prevent violence by payment of some labor claims for the men whose checks had been stopped. The payment had been stopped by them upon my advice in order that further evil might not flow from their being cashed by third parties.

Q. I believe on one afternoon when I was out there there were some 20 men in a pretty angry frame of mind?

A. That is correct. It was a secondary appearance to the matter which we are speaking of. When I found No. 1 that there would be no violence, and No. 2 it would not be necessary for use on bail or unlawful bail if there should be imprisonment, following my instructions from the loaner, I procured a reconveyance and paid him back the money by

(Testimony of Paul Taylor.)

delivering him a cashier's check for that amount.

Q. In other words, in your opinion title to that money never passed to William Rameson?

A. No, it did not.

Mr. Slane: That is all I have.

The Referee: All right, gentlemen. That is all.

(Which was all the evidence offered and received at the time and place aforesaid.) [68]

[Endorsed]: Filed October 5, 1954.

In the District Court of the United States, Southern District of California, Central Division

[Title of Causes Nos. 55,190, 55,191, 55,062.]

REPORTER'S TRANSCRIPT OF HEARING ON OBJECTIONS TO DISCHARGE

Tuesday, Aug. 31, 1954, at 2 o'clock p.m.

Before the Honorable Hugh L. Dickson, Referee in Bankruptcy.

Appearances: for the Trustee and Objector: Slane, Mantalica & Davis by Harold A. Slane and David T. Stockman. For the Bankrupts: Paul Taylor and David Sosson. For Objecting Creditor: Most, Richard & Lincoln by J. Cooper. [1*]

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* Page numbers appearing at top of page of original Reporter's Transcript of Record.

The Referee: Now what about the objections to discharge?

Mr. Slane: If I may be heard, your Honor, our basic objection to the discharge, filed on behalf of the Trustee, was on the fact that there was a complete or almost complete total failure on the part of these two partners to explain or to satisfactorily explain what had happened to all of the funds received out there, and to explain what had actually gone on that precipitated this tremendous amount of money that they owed all of a sudden, so to speak.

I would like to refresh your Honor's memory briefly concerning the testimony of Frederick Rameson and William Rameson by referring to an examination conducted by myself, held in this courtroom on January 7, 1953, which is a part of the record here, and refer your Honor particularly to page 11, starting at line 16, where your Honor made this comment, or asked this question:

"How do you account for that loss, however, much or little it might have been?"

Mr. Frederick Rameson was the witness and he answered:

"I believe it was relevant to establish the fact that it was relatively smaller than suggested.

"The Referee: Assume it was $100,000, tell us how [2] you account for having lost that much.

"The Witness: Frankly, sir, I cannot account for it. When I was exposed to the information, when I received the first balance sheet that I had any knowledge of whatsoever the fact that our busi-

ness lost any money, let alone not being in the financial status that I thought it was, I have the date in my pocket, I believe it was the first part of September when my accounting organization finally gave me the figure and it was the first time to my knowledge according to my concept that we were in a position that was in a financial bankruptcy stage."

Then going on to page 37, still referring to Frederick Rameson's testimony at that time, starting in with line 1:

"The Referee: In other words, you started from scratch in this thing, apparently, and didn't know anything about the building business and didn't know how to keep up with the financial status. Is that true? You sat there and took in money and didn't know what happened to it. All right, sir.

"The Witness: We didn't know that was the case.

"The Referee: That is the way it impresses me.

"Mr. Slane: Q. What is your educational background, Mr. Rameson?

"A. I went to Los Angeles High School, sir. I went to the University of Southern California. I took my [3] undergraduate work before the war. I took my B.S. I was in the war approximately three years. Then I went back to the University of Southern California and took my Bachelor of Law degree.

"Q. Did you graduate among the top five in your class?

"A. I don't know if it was that high."

I give your Honor that particular quotation be-

cause it shows the background of educational experience that Mr. Rameson had and therefore he should certainly be a person who should be able to account in some manner for the loss of funds.

If you will go through his testimony you will find time after time I was trying to pin him down to find out how these lawsuits came about. It always came to the same conclusion, "I don't know." There was no way in which we could pin down the two partners as to just what had happened there.

A little later on we will produce testimony with regard to the records. The records we will show were in such a condition as to make it almost impossible for the Trustee to find out the true condition of the business. It took a lot of work and a lot of time.

I would like to pay tribute to Mr. Taylor because he did give us 100 per cent cooperation in trying to reach that information. [4]

Now going through to the testimony of William Rameson, page 50 at line 13, where I asked the question.

"Q. You are saying that your actual construction was pretty near a break-even deal and that the loss came about by all of this expensive front?"

We were talking about these 25 or 30 odd private offices out there.

The Referee: I remember it.

Mr. Slane: He answered, "Inasmuch as I am on the stand, I don't want to make a statement as to what I think it is because I really don't know what it is. I am in exactly the same boat. I know what

Fred said on the stand. We were unaware we were in the hole. We thought we were doing a good job. All of a sudden when we found out we were not doing a good job we immediately did what we thought was right and honest and immediately notified all parties concerned."

Then we went into testimony on the cost of the construction of these houses. There again we got a lot of evasive answers which did not pin down exactly what those costs were, although from our examination we had determined what the costs were. They were running far in excess of what they were contracting to do the jobs for. We were unable to obtain any information on that particular point.

On page 51 of his testimony I asked the question, "I take it your testimony would be approximately the same to [5] every one of the questions I asked Fred?" His answer was, "That is correct." In other words, he reaffirmed all of the matters which Fred testified to as being his answers. So we were left without any lead or guide as far as the partners of this concern were concerned as to what had been the real cause of the problem and where all of the funds had gone to. We can produce testimony concerning the records by their auditor, who is in the courtroom today.

Our objection primarily is based upon the failure to explain what happened in the course of the conduct of that business, the complete helplessness of the management of this concern which, if your Honor recalls, there could have been liabilities exceeding a million and a half dollars here, contingent

liabilities of finishing up contracts. However, we were fortunate in wiping out a lot of past litigation. They had taken a tremendous amount of funds directly or indirectly from individuals who had pledged or transferred their lots to them on which to build houses, financed through various financing institutions. Those funds were not segregated job by job. They were dumped into a common fund. There was no way of tracing or checking as to where the funds from "X" house went, whether they went to pay the bills on "X" property or "Y" property. The accounting was not set up in a way that you could trace where these funds went. So it was an impossible situation both from the standpoint of the Receiver and the Trustee, and for our office [6] and for the people who had entrusted them with their properties. As I recall there were seven or eight lots which had been transferred to the Ramesons. All of those matters had to be cleared up and it was a very difficult task to run them down.

Personally I feel that men who conduct their business in this fashion with a total disregard for the normal practices of keeping records to establish the proper facts in a case of this kind should not receive the bath that the Bankruptcy Court gives in a discharge. I feel a man has a responsibility that has not been performed here. The brothers have not performed it and they should not at this time be discharged.

Mr. Stockman from my office has some further evidence that he wants to put in on another point

along with this same general line with regard to the opposition to the discharge.

The Referee: Call your first witness, Mr. Stockman.

Mr. Stockman: The Trustee would like to substitute in and adopt and prosecute the objection as made on behalf of Jarmulowsky. Mr. Cooper is here from that office. It is quite satisfactory that we prove up this objection.

The Referee: Let's go ahead.

JACK CONRAD

called as a witness on behalf of the Trustee and Objector, being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Stockman): What is your name?

A. Jack Conrad.

Q. Your occupation, Mr. Conrad?

A. Accountant.

Q. Did you formerly work for Rameson Brothers? A. Yes, sir.

Q. Can you give us the approximate period of your employment? When did you begin?

A. July of 1950 through August, 1952.

Q. Did you not also work, after the petition in bankruptcy was filed, under the auspices of Mr. Goggin?

A. Yes. I was employed by the Receiver in Bankruptcy for approximately two months.

Q. What was your position with Rameson Brothers?

(Testimony of Jack Conrad.)

A. Bookkeeper in charge of the accounting office.

Q. You were the head of the Accounting Department? A. Yes.

Q. Mr. Conrad, to the best of your knowledge, was it the practice of Rameson Brothers to write checks in advance, thereby creating at times book overdrafts?

Mr. Taylor: I want to object to the question on the ground it is complex. It embodies the conclusion of the pleader and cannot be answered by the witness.

The Referee: I don't think so. The objection is overruled. [8] What is your answer?

The Witness: Yes.

Q. (By The Referee): In other words, they would draw checks in advance, which would create a shortage or overdraft in the bank?

A. Correct.

Q. Is that right?

A. It created a book overdraft.

Q. A book overdraft? A. Yes.

The Referee: All right, sir. What is your next question?

Q. (By Mr. Stockman): Mr. Conrad, did the firm of Rameson Brothers keep an accounts payable ledger? A. Yes.

Q. Did they keep an actual ledger or file of bills payable?

A. A Cardex System which was posted through a Burroughs Sensomatic.

(Testimony of Jack Conrad.)

Q. These are the actual bills themselves that were indexed?

A. No. They were actually posted on ledger cards.

The Referee: Is that the ordinary and regular way of keeping books?

The Witness: There are two systems more or less commonly used. [9]

The Referee: Is that commonly used?

The Witness: Yes, it is commonly used in organizations having a large volume of accounts payable.

Q. (By Mr. Stockman): You previously stated checks were prepared in advance. Now I will ask you at what time were the bills posted as paid, when those checks were drawn or when actually the bills were paid?

A. When the checks were drawn.

Q. When you worked for Mr. Goggin after the filing of the petition in bankruptcy did you find bills marked paid that in fact were not paid?

A. Yes.

The Referee: Who marked them paid, do you know that?

The Witness: They were marked paid automatically upon the disbursement of a check.

Q. (By Mr. Stockman): Mr. Conrad, at times were checks given to creditors and bills marked paid before those checks cleared? A. Yes.

Q. Were there ever any agreements with creditors-suppliers, orally, or in writing, not to cash

(Testimony of Jack Conrad.)

these checks until further word from Rameson Brothers? A. Yes.

Mr. Sosson: That is objected to as calling for a conclusion.

The Referee: If he knows. Do you know that of your [10] own knowledge?

The Witness: Yes.

Mr. Sosson: We should have the specific creditors, dates and amounts.

The Referee: Sir?

Mr. Sosson: This is a question that calls for a conclusion on the part of the witness.

The Referee: If he knows it. If he heard the Ramesons ask Bill Jones, a creditor, not to cash a check, I wouldn't think it was a conclusion.

Mr. Sosson: He can identify them.

The Referee: Did you hear them, sir?

The Witness: Yes.

The Referee: Objection overruled. It is not hearsay if I hear you say, "Hello, Tom Brown." What is the next question?

Q. (By Mr. Stockman): Mr. Conrad, how often were balance sheets prepared for Rameson Brothers in your period of employment?

A. Formalized? You mean the conventional type of balance sheet?

Q. Yes.

A. There was a balance sheet prepared by the certified public accountant at the close of the taxable period prior to the petitioning in bankruptcy which I believe—there was a fiscal year involved.

(Testimony of Jack Conrad.)

I don't remember exactly [11] the date and the proximity of the time between that date and the filing of the bankruptcy, but I would estimate myself that from that point forward there were perhaps one or two balance sheets prepared, but they did not tie in exactly with the general ledger accounts. They were based on a different type of statement more along the line of a pro forma type of statement.

Q. At best, were balance sheets prepared infrequently and perhaps for tax purposes?

A. The conventional type of balance sheet was infrequently prepared.

Q. Was there a chart of some sort or another on the wall in Fred Rameson's office showing work in progress and perhaps how far along the work was? A. Not in his office, no.

Q. Was there one? A. Yes.

Q. Where was it located?

A. The chart to which I believe you refer is a chart which denoted physical progress, construction progress made on the jobs. That chart was in the office of the Construction Control Department.

Q. What was the purpose of that chart? Was it to show the work in progress and how far along it was?

A. The chart was for the purpose of scheduling construction operations. [12]

Q. Would you say this business was run not only from this chart but in general on a basis of projection accounting rather than the firm being guided

(Testimony of Jack Conrad.)

by balance sheets and income statements periodically prepared?

Mr. Sosson: That is objected to as calling for a conclusion of the witness.

The Referee: Presumably this man is an expert bookkeeper. The objection is overruled. You may answer the question.

The Witness: It would be in a sense an answer of speculation. However, I do believe in my own mind.

Mr. Taylor: Wait a minute. I object to any further answer.

The Referee: You need not answer if the matter is speculation. Objection sustained. What is the next question?

Q. (By Mr. Stockman): In the business transactions with loaning institutions was it necessary to execute affidavits in order to receive progress payments?

Mr. Taylor: I object to that on the ground it is a blanket question. It does not refer to specific institutions, times and contracts. If he will ask the question in that form I will not object.

The Referee: You might ask if it is the general custom.

Q. (By Mr. Stockman): Is that generally a custom with [13] which you are generally acquainted, Mr. Conrad? A. Yes.

Q. Frequently did not these affidavits that you customarily received from these loaning institutions have a blank space on them in which to place

(Testimony of Jack Conrad.)

the amount of labor and material bills previously paid?

Mr. Taylor: I will make a further objection, your Honor, to any answer of this witness on the ground it would not be the best evidence available, in the first place.

The Referee: Objection sustained. The document itself would be the best evidence of what it contained. Next question.

Q. (By Mr. Stockman): Mr. Conrad, were the records and accounts of Rameson Brothers kept posted up to date? A. No.

Mr. Taylor: To which I object on the ground it is a blanket question. There are many kinds of journals and books.

The Referee: All records in general?

The Witness: All records were not entirely current.

The Referee: I didn't hear you, sir.

The Witness: All records were not current.

The Referee: They were not current. Next question, please.

Mr. Stockman: That is all the questions I have of this witness. [14]

The Referee: Any cross examination?

Mr. Taylor: Yes, your Honor.

Cross Examination

Q. (By Mr. Taylor): But some records were current? A. Yes.

Q. Many were current? A. Yes.

(Testimony of Jack Conrad.)

Q. You were the one who perhaps six months after you went to work there were in charge of the Bookkeeping Department, weren't you?

A. Yes.

Q. When you went there they had a bookkeeping system of each house being separately kept and records being separately kept as to that construction project? A. Yes.

The Referee: Did they?

The Witness: With respect to cost.

Q. (By Mr. Taylor): All money received and paid out on that house?

A. Yes, at one time there was.

Q. Do you remember the name of the certified public accountant that they had a while ago?

A. Yes.

Q. Who was that? A. Mr. Rod Redmond.

Q. At Mr. Redmond's suggestion and your own you changed from a straight bookkeeping book for each house to a general or consolidated system of bookkeeping to avoid the multiplicity of signatures on various checks, didn't you? A. Yes.

Q. Over a period of time?

A. Yes, with respect to the maintenance of a bank account, the receipt of funds and the disbursement of funds.

Q. So the funds came into a so-called consolidated account? A. Yes.

Q. Some money was put into a general account?

A. Yes.

(Testimony of Jack Conrad.)

Q. Those were the two principal bank accounts?

A. Yes.

Q. Taking the place of the old building accounts and later the division accounts?

A. That is correct.

Q. While this was going on you had a place of your own being built, didn't you? A. Yes.

Q. At the time of the failure of the operations you yourself were a loser to the extent of some forty-five or forty-six hundred dollars?

A. Yes.

Q. On your own house? [16] A. Yes.

Q. You kept books on your own house along with the others? A. Yes.

Q. This big sheet on the wall some place that has been spoken of was a so-called construction project record, wasn't it? A. Yes.

Q. Where they were given numbers or some other designation to trace the status of construction? A. Yes.

Q. Now, as time went on, they took over the facilities and the work of some of the subcontractors, didn't they? A. Yes.

Q. For example, there was the paint and painting subcontracting done by their own labor?

A. Yes.

Q. Then the same was true as to landscaping, is that right? A. Yes.

Q. And as to plumbing? A. Yes.

Q. And as to electrical work? A. Yes.

Q. And as to cabinet making, et cetera? [17]

(Testimony of Jack Conrad.)

A. Yes.

Q. So that toward the end of the program things got into a bind where for example you had $30,000 in withholding taxes and Social Security payments to meet, is that right? For example, there would be large payments due? A. Yes.

Q. Due periodically that had not been so before?

A. Yes.

Mr. Stockman: I object to this as immaterial.

The Referee: I don't see the purpose of all this.

Mr. Taylor: Checks were made out before they were due. I believe you testified about that.

Q. Isn't it true that checks were made out when the girls working under you had time to make out the checks, and they were left in the book, or whatever it was that you had which had to do with the checks or bills? A. Yes.

Q. And they were not handed out until they were due and to be paid?

A. When they were to be paid, yes.

Q. I believe you once testified that was done so as to conserve time of the employees?

A. Yes.

Q. It is not an uncommon habit in your bookkeeping system with which you are acquainted——

Mr. Stockman: I object to that. He has not [18] been qualified as an expert.

The Referee: Let's hear all of it.

Q. (By Mr. Taylor): Is that done in other institutions? A. Yes.

Q. It is common in bookkeeping? A. Yes.

(Testimony of Jack Conrad.)

Q. After you had been there a matter of a very few weeks you had full charge of the books and accounting methods yourself? A. Yes.

Q. That was true up to the date when there was an assignment to the creditors and it was taken over? A. Yes.

Mr. Taylor: That is all.

The Referee: Anything further?

Mr. Slane: I would like to ask one or two questions on redirect.

Redirect Examination

Q. (By Mr. Slane): Mr. Conrad, when you were stating that checks were drawn and yet not released and bills were stamped paid that those checks covered you were not talking about checks that were drawn to keep the girls busy?

A. What is that?

Q. These were checks other than those drawn in advance as a matter of convenience? [19]

A. I am sorry. I don't understand.

Q. What I am getting at, the checks that you say were drawn and were not released to the payee and yet the bills were stamped paid, those were checks other than those that were drawn in advance as a matter of convenience of trying to conserve time of the help? A. Yes.

Q. It was all the same transaction?

A. May I explain the situation?

Q. All right.

A. Checks were primarily prepared in advance

(Testimony of Jack Conrad.)

for the purpose of saving clerical help, rather than to do the work intermittently, to do it at one particular time. That was the primary purpose of paying a bill although the check was not released.

The Referee: What would be the purpose of marking a bill paid when you did not mail the check to the man?

The Witness: As far as a bookkeeping problem is concerned, you have a reduction of the cash account balance, so you have to reduce the accounts payable.

The Referee: I see.

Q. (By Mr. Slane): Then you would certify to Cal Federal or some other financing institution that certain bills had been paid. To get around the objection I refer specifically to about $14,700 worth of bills of Lord-Babcock, Inc., for plumbing supplies that your records showed were stamped paid and [20] on which checks were never sent to Lord-Babcock, but Cal Federal was certified as having been paid. Is that correct?

A. That condition may have existed.

Q. Every article in those bills of Lord-Babcock were gone into after bankruptcy?

A. As I recall, a good number of bills were from Lord & Babcock, but I don't recall specifically $14,000.

Q. That was the total of the group in that particular series.

A. I see. It may have very well happened.

Q. Did that type of thing go on there?

(Testimony of Jack Conrad.)

A. To my knowledge that was not the purpose of paying the bills in advance. To my knowledge I don't believe the purpose of the issuance of the checks and the marking of the bills paid was as you suggest, for that purpose.

Q. But those bills were deducted from your accounts payable? A. Yes.

Q. And did not show on the accounts payable, but you had not paid Lord & Babcock?

A. I don't recall the specific instance, but that condition could very well have existed.

Mr. Sosson: I will object at this time and move, for the purpose of making the objection, a motion to strike the [21] answers of the witness to the matter of Lord & Babcock. There is nothing in the specification here that puts us upon notice that we need to meet that issue.

The Referee: It is a general inquiry into the method of bookkeeping out there. The injection of a name like Bill Jones or Tom Brown would modify the objection.

Mr. Slane: It is for the purpose of illustration.

Mr. Sosson: But it is an allusion to a particular item of indebtedness which we cannot meet.

Mr. Stockman: This particular objection can be drafted in the general language of the statute and need not be specific.

The Referee: What is your motion?

Mr. Sosson: The motion is to strike the testimony.

(Testimony of Jack Conrad.)

The Referee: The motion will be denied. What is the next question?

Mr. Slane: I have no more questions from this witness.

The Referee: Anything further?

Mr. Taylor: I have a few more questions.

The Referee: Go ahead.

Recross Examination

Q. (By Mr. Taylor): You remember testifying in this city in the Municipal Court in the matter of the People vs. Rameson? A. Yes. [22]

Q. All of the testimony you gave there was true and correct? A. Yes.

Mr. Taylor: That is all.

The Witness: Is there any further attendance required on my part?

Mr. Taylor: Not on my part.

The Referee: Call your next witness, please.

Mr. Slane: Is it the intention of Mr. Taylor to introduce in evidence the entire record?

The Referee: I won't go into that right now. That matter took three weeks before Judge Ambrose. You won't unload that on me. I am interested in knowing if these people kept proper and competent books from which their financial status could be ascertained. That is the basis of this objection. I won't try the Municipal Court case or Judge Ambrose's case. Call your next witness.

Mr. Stockman: I will call Mr. Johnson.

F. N. GEORGE JOHNSON

called as a witness on behalf of the Trustee and Objector, being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Stockman): State your full name, please? A. F. N. George Johnson.

Q. Where do you live, Mr. Johnson? [23]

A. South Gate, California.

Q. You are employed by, or at least at times have worked for Mr. Goggin, the Trustee in Bankruptcy, is that correct? A. That is correct.

Q. Did you work on the Rameson Brothers' records? A. Yes, I did.

Q. Would you say you did considerable and/or extensive work?

A. No, preliminary work only.

The Referee: What is your occupation, auditor?

The Witness: Public accountant, certified in California.

Q. (By Mr. Stockman): How long have you been an accountant? A. About 25 years.

Q. How long have you been handling bankruptcy matters? A. About eight years.

Q. Are you a licensed public accountant in the State of California? A. Yes, sir.

Q. During this 25 years of experience as an accountant and eight years in bankruptcy you undoubtedly have audited many records, is that correct? A. That is correct. [24]

(Testimony of F. N. George Johnson.)

Q. To your knowledge did Rameson Brothers write checks in advance of actual payments?

A. I don't believe I understand your question.

Q. Did you find checks prepared in the bankrupt's books that had not been sent out?

A. Yes, I did.

Q. Also many checks that actually were sent out not had cleared the bank, is that right?

A. That is right.

Q. To your knowledge was there an accounts payable ledger kept?

A. No. I did not find one.

Q. How was this accounting matter handled?

A. The accounts payable?

Q. Yes.

A. It appeared that they kept an accounts payable or bills payable in a looseleaf folder. They were paid as they became due or as someone in the Accounts Payable Department designated them to be paid.

Q. To the best of your knowledge, gained from reviewing the records in this matter, when were these bills marked paid?

A. It appeared at the time the check was drawn.

The Referee: The same dates?

The Witness: Yes. In other words, they drew the check—— [25]

The Referee: And marked the bill paid?

The Witness: And stamped it. As I recall there was a block stamp which blocks in the word "Paid"

(Testimony of F. N. George Johnson.)

and the letters indicated what account was to be charged and the date and the number of the check.

Q. (By Mr. Stockman): When you were reviewing the records and accounts of the bankrupt after they filed in bankruptcy did you find bills marked paid that in fact were not paid?

A. Yes, I found quite a number of them.

Q. From your knowledge of handling all or nearly all of the records and accounts of this business, and from your past experience, would you say that the bankrupt kept accounts and records from which his financial condition and business transactions might be ascertained?

A. I would say that his accounting system was adequate if it had been properly maintained and kept up to date—that he could have ascertained his financial condition.

Q. But in your opinion it was not kept adequately; is that right? A. No.

Q. Was this condition in main or in part caused by a failure to keep the posting of accounts up to date?

A. In most instances that is correct.

Q. How far behind in posting were the records of [26] Rameson Brothers?

A. When I came down there in October of 1952 the general ledger had only been posted through June. There were maybe one or two items of July posted, but that is all.

Mr. Stockman: Your witness, Mr. Taylor.

(Testimony of F. N. George Johnson.)

Cross Examination

Q. (By Mr. Taylor): Mr. Johnson, do you remember seeing me out at the place of business pretty regularly?

A. That is true, Mr. Taylor.

Q. Do you recall my going over the books and pointing out the fact that out of a multiplicity of checks, quite a bundle, let us say three or four hundred of them had been sent out and had come back and I had payment on the checks stopped at the bank. Do you remember that?

Mr. Stockman: I object to that as immaterial.

Mr. Taylor: This is to explain how some checks could have been sent out and came back, and when the checks were sent out the bills were stamped paid.

The Referee: Would that cover all of these checks?

Mr. Taylor: No. I only want to cover one block at a time.

The Referee: All right.

Q. (By Mr. Taylor): Do you remember one large bundle of checks?

The Referee: That you had stopped payment on? [27]

Q. (By Mr. Taylor): They stopped payment on my order?

A. I recall some of those checks, yes.

Q. On many of these the bill was taken from a voucher and a check made out and then they maintained what we call a paper bank balance or book

(Testimony of F. N. George Johnson.)

balance at the bank as contrasted to their actual physical condition?

A. I believe I ran across a yellow tabulation sheet with hundreds of figures on it. It was supposed to represent the current bank balance, but I never did check it to see if it was accurate.

Q. While you were there Mr. Conrad, who was just on the stand, was employed by the Trustee and the Receiver preceding him to aid and assist you or to do whatever other work was necessary in connection with the business?

A. Yes. He worked for us for about 10 days, I believe.

Q. Whenever you made inquiry concerning the books he is the one who told you about them?

A. That is correct.

Q. When you talked to either of the Rameson brothers they did not know much about it themselves?

A. I don't believe I ever talked to them about explaining any entries in the books.

Q. Everything that you asked about of Mr. Conrad he explained it to you to the best of his ability?

A. That is right. [28]

Q. The bookkeeping system as it was when you found it was his baby, that is to say, it was the one he set up?

A. He seemed to take the responsibility for it.

Mr. Taylor: That is all.

The Referee: Q. In your experience as a public accountant would you say whose duty it is to

(Testimony of F. N. George Johnson.)

see that books are properly kept, the proprietor, the owner or operator of the business, or the Bookkeeping Department? In other words, the thought runs through my mind should the proprietor have any degree of supervision, have anything to do with the inspection or ascertaining the condition of his business?

A. The proprietor hires the controller, auditor or accountant and pays him. I believe it is his duty to supervise that man's work.

Q. To see that he does what he is supposed to do? A. That is right.

The Referee: That is the thought that ran through my mind.

Mr. Slane: May I ask a few questions?

The Referee: Yes.

Redirect Examination

Q. (By Mr. Slane): Mr. Johnson, did you find any financial statement that had been prepared by Rameson Brothers?

A. I recall one, but I can't tell you what the date was on it. It was an old one. [29]

Q. Was any file shown to you or made available to you of monthly P&L statements?

A. I don't recall a monthly P&L.

Q. Were there any records that you found there that indicated the exact status of any particular house that was under construction as to whether it was a profit or loss on any individual home?

(Testimony of F. N. George Johnson.)

A. There was a record there of what the project should cost and what had been charged against it, but for the purpose of making a progress report for the Trustee or Receiver I did not use any of those figures at all. I built up my own figures on it.

Q. Do you recall whether there was any entry on that progress report covering overhead, I mean that big organizational overhead that they had out there?

A. I believe they called it burden. It was the last item on the list.

Q. That was listed as burden? A. Yes.

Mr. Slane: That is all.

Recross Examination

Q. (By Mr. Taylor): Mr. Johnson, in an ordinary business of this nature, a contracting business, if you walk into the office at a given moment on any day, even though it is a going concern, you won't find the books posted right up to the minute and [30] day, will you?

A. Oh, no, not to the day.

Q. And sometimes not the week, or still more?

A. If you were over two weeks behind it would be unusual.

Q. Let us suppose that the bookkeeper or chief accounting officer is employed by a young business man, or two of them, and works with and under the supervision of a C.P.A., from your experience are you able to say whether or not the employers

(Testimony of F. N. George Johnson.)

are able to and should be able to rely upon their chief accounting officer?

Mr. Stockman: I object to that on the ground it calls for a legal conclusion.

The Referee: I asked him a question along the same line. Let's have the answer.

The Witness: I would say if the employer hired a man who represented him who could prove that he had a certified public accountant's certificate to practice in the State, he should be able to depend upon him.

Q. (By Mr. Taylor): If that man in turn works with the chief accounting officer of the firm, who is not a certified public accountant, what would you say?

A. He should be able to depend upon him.

Mr. Taylor: That is all.

The Referee: Don't you think it is the duty of an owner or proprietor to see how they stand, whether they are [31] running in the red or going ahead?

The Witness: Certainly.

Q. (By Mr. Slane): Did you find any evidence that the certified public accountant was actively participating in the accounting system out there?

A. No, I can't say that I did.

The Referee: Is that all from Mr. Johnson?

Mr. Slane: That is all.

Mr. Taylor: That is all.

Mr. Stockman: I will call Mr. Janken.

SIDNEY JANKEN

called as a witness on behalf of the Trustee and Objector, being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Stockman): Will you state your full name, please? A. Sidney Janken.

Q. Where do you live, Mr. Janken?

A. 16916 Bollinger Drive, Pacific Palisades.

Q. What is your connection with the Rameson bankruptcy?

A. They contracted to build my home for me.

Q. In connection with building your home was it necessary for you to obtain a loan?

A. It was.

Q. Where did you obtain that loan? [32]

A. At the California Federal Savings & Loan.

Q. To your knowledge from your dealings with California Federal Savings & Loan Company can you say whether your lending institution required evidence to enable contractors to receive progress payments?

Mr. Taylor: I will object to the question on the ground that there is nothing to show that this man appears as an officer or employee of that firm.

The Referee: You have not heard the question.

Mr. Taylor: I thought I had.

The Referee: Let's get the question and then we can have your objection. Don't jump the gun.

Q. (By Mr. Stockman): Did your lending agency require evidence on your specific home loan

(Testimony of Sidney Janken.)

to enable Rameson Brothers to receive progress payments?

Mr. Taylor: To which I will object on the ground this man has not yet appeared as an officer or employee of that firm.

The Referee: It makes no difference. He was having a home built by them. He can testify as to whether or not they required it.

Mr. Taylor: I cannot push from my mind the testimony of the officers of that institution who have testified in these matters.

The Referee: You are mixing up another lawsuit with this one. I will keep it straight. Objection overruled. [33] Here is a man who was having a house built. He should be able to tell us what they required him to have.

The Witness: I don't know what they required of Rameson directly.

The Referee: But of you, sir, on your own job?

The Witness: On my own job, they did not require anything of me after the funds were made available for construction.

The Referee: There is your answer.

Q. (By Mr. Stockman): You say you are not aware of these affidavits which were required, is that right?

A. I have never seen any nor have I been told about any.

Mr. Stockman: Your witness.

Mr. Taylor: No questions.

Mr. Sosson: No questions.

The Referee: Call your next witness.

Mr. Stockman: The Trustee rests, your Honor.

The Referee: What is your defense?

Mr. Sosson: Your Honor I have a brief motion at this time on behalf of the bankrupts. With respect to the specifications filed by the Trustee, I submit, your Honor, that they——

The Referee: Do they allege failure to keep books adequately?

Mr. Stockman: No, your Honor. The Trustee's objection [34] is failure to account.

Mr. Sosson: Merely failure to account. The specifications are not verified. They are rampant with conclusions of law and conclusions of fact.

The Referee: You say they are not verified?

Mr. Sosson: They are not verified, your Honor. The copy I have indicates no verification.

The Referee: Was the original verified?

Mr. Stockman: I don't have the original with me. I think it can be corrected by amendment.

The Referee: I don't hear what you say. Talk out loud.

Mr. Stockman: I think they can be verified now. That can be corrected by amendment even at this stage.

Mr. Slane: The original would be in the Court's file.

Mr. Cooper: If your Honor please, the attorney for the Trustee and myself, appearing on behalf of Gerald and Louise Stack, Fred Salatino and Sol Jarmulawsky have the same objections and those were verified.

The Referee: You have the same objections?

Mr. Cooper: Yes, sir.

Mr. Sosson: I have two objections. I shall deal with one at a time.

The Referee: You have the same objection filed by another creditor? [35]

Mr. Stockman: No, it isn't the same.

The Referee: I only know what you tell me.

Mr. Sosson: We have been served with a copy and it does not indicate that it is verified. I make the specific objection to the lack of verification.

The Referee: I will let them be verified if the original is not verified.

Mr. Sosson: I submit that it comes late, your Honor.

The Referee: You knew what the objections were, whether they were sworn to or not. You were not taken by surprise.

Mr. Sosson: No. I am not claiming surprise, your Honor. I merely call for proper verification of the pleadings. I don't think it is properly included in the file if it does not conform to the rules.

The Referee: It can be amended.

Mr. Sosson: Furthermore, your Honor, I submit that the Trustee cannot make objections to a discharge unless he is so authorized by a meeting of creditors.

The Referee: Oh, no.

Mr. Sosson: And that meeting be called specifically for that purpose.

The Referee: There is nothing in that.

Mr. Stockman: That is no longer true.

Mr. Sosson: I don't understand what the Court means.

The Referee: The Trustee can act on his own motion [36] when he sees fraud or misconduct. He does not have to go to the creditors.

Mr. Sosson: There is no fraud alleged here.

The Referee: I will put it this way, failure to keep adequate books of account. The Trustee does not have to get the permission of creditors or even of the Referee.

Mr. Sosson: I will merely repeat that the Trustee's specifications of objections merely in all of the paragraphs therein allege that the bankrupts could not account for their losses.

The Referee: I think that is pretty clearly demonstrated from the testimony that I heard from these gentlemen. They said they did not know what happened to it. Both of them on the stand so testified.

Mr. Sosson: That does not meet the requirement of adequate books.

The Referee: Then your motion is overruled. Is there anything else you wish to introduce? What about the other specifications of objections. You say yours are along the same line?

Mr. Cooper: They are along the same line.

The Referee: Failure to keep books?

Mr. Cooper: Yes, your Honor. Failure to keep proper records and accounts.

The Referee: Is yours verified?

Mr. Cooper: Yes, your Honor. [37]

The Referee: By a creditor?

Mr. Cooper: Yes, your Honor.

Mr. Sosson: That is correct, your Honor.

The Referee: What is next?

Mr. Stockman: That is all the objections we prove up.

The Referee: I am clearly of the opinion that these gentlemen were very, very indifferent as to what was going on in their business. They took no personal account of it. They left their people do work without proper supervision on their part. They defrauded a number of people, as the testimony shows, by inducing them to convey lots to Rameson Brothers on the representation that they could more readily finance the lots, which is a misstatement because they lend money not on the color of the man who owns title, but on the security of the property. So I hold that they are not entitled to a discharge on the basis of what I have heard this afternoon.

Mr. Taylor: If your Honor please, I would like to call my witnesses to the stand. You are making up your mind before you have heard all of the evidence.

The Referee: I asked you if there were any other witnesses and there was dead silence.

Mr. Taylor: I will call Fred Rameson.

The Referee: Do you think I have time to sit here all afternoon and wait until you do something?

Mr. Taylor: No, your Honor. [38]

The Referee: I will withdraw my opinion. Bring on your witnesses. Wake up.

Mr. Taylor: I was awake, your Honor. I am very sorry I did not speak loud enough.

FREDERICK MILLARD RAMESON

bankrupt herein, called as a witness on his own behalf, being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Taylor): State your full name.

A. Frederick Millard Rameson.

Q. You are one of the bankrupts in this case?

A. That is correct.

The Referee: Are you the young man who took the law course?

The Witness: Yes, sir.

The Referee: All right, sir. Fine.

Q. (By Mr. Taylor): Mention has been made of some lots on which you built houses with title in your own name. Was anybody else's money in this but your own?

Mr. Stockman: Objected to as immaterial.

The Referee: Objection overruled.

Q. (By Mr. Taylor): At the time of bankruptcy you had about eight houses called speculative or demonstration houses?

A. Those were our own. [39]

Q. Was anybody else's money in them?

A. No, sir.

The Referee: Did you induce any person to convey title to their property, their lots, to you, under

(Testimony of Frederick Millard Rameson.)
the statement that you could more readily finance it if they were in your own name?

The Witness: No, sir, I never did. No one in the organization that I know of ever did, sir.

Q. (By Mr. Taylor): Would you state positively there were no such lots ever so dealt with?

A. I know of none, sir.

Mr. Taylor: Your Honor, not anticipating this I do not have the records of the auditor, Mr. Johnson, who was on the stand.

The Referee: Put your question, please. Let's try the lawsuit.

Mr. Taylor: I can't do it without the records on each one of the houses.

The Referee: Let's not make speeches.

Mr. Taylor: I have to mention the particular houses.

The Referee: As I recall in the testimony several people had been induced by representations to convey their lots to the Rameson Brothers on the theory that they could more readily finance them. He says that is not so. Let's go ahead.

Q. (By Mr. Taylor): You employed Mr. Conrad, who was on [40] the stand heretofore?

A. Yes, sir.

Q. Did he have charge of the Bookkeeping Department from the time you brought him in there?

A. Yes, sir.

Q. How many helpers did he have?

A. I believe it was either four or five.

(Testimony of Frederick Millard Rameson.)

Q. Did he hire as many as he wanted from time to time?

A. Yes, sir. It was up to his discretion.

Q. Did he consult with you daily about matters of business or thereabouts? A. Yes, sir.

Q. From time to time did the C.P.A. who has been mentioned here work with him in connection with keeping your books? A. Yes, sir.

Q. Did you at all times rely upon your bookkeeper? A. Yes, sir, I did.

Q. You heard him testify that his own home was built at the time of this crash? A. Yes, sir.

Q. What was this sheet that was talked about, the production sheet on the wall?

A. There was a production sheet, but I don't remember the details of it. [41]

Q. What was this big sheet, if you remember, that showed the progress of the houses?

A. Our Production Department had a sheet that showed where the crews were to move from job to job. I believe that was what the reference was to, sir.

Q. Did that show anything concerning the financial condition? A. No, sir, not at all.

Q. Did you ascertain for the first time on or about the 2nd of September, 1952, that you did not have enough to meet the bills as they came due?

A. That is correct.

Q. How did you find that out?

A. My Accounting Department gave me a financial statement, sir.

(Testimony of Frederick Millard Rameson.)

Q. Is that the first financial statement that they had given you?

A. No. In previous years they had given me other ones, sir.

Q. How many houses had you built before this emergency set in? I will change that question.

Did you build about 150 to 175 houses before any of those that are mentioned in the bankruptcy?

A. I believe so, sir.

Q. There were about 36 or 37 mentioned in the bankruptcy? [42]

A. Somewhere in that neighborhood, yes, sir.

Q. Were you yourself a bookkeeper or did you have any knowledge of bookkeeping?

A. No, sir.

Q. Did you rely wholly upon your Bookkeeping Department for your information?

A. Yes, sir.

Q. Did you ever make or publish any false statements in writing respecting your financial condition to Sol Jarmulawsky or any other creditor?

A. No, sir.

Q. (By The Referee): I believe you testified before me that you never did make financial statements to anybody. Is that true?

A. That is correct, sir.

The Referee: I remember that very definitely. He said he never gave a financial statement to anybody.

Q. (By Mr. Taylor): Were you ever asked for one except by two people, one of them this credit

(Testimony of Frederick Millard Rameson.)

reporting agency, Dun & Bradstreet. Do you remember them? A. Yes, sir.

Q. They asked for one and you said you were not giving any? A. That is correct, sir.

Q. The other one was one of the finance companies, I have forgotten the name. [43]

Did you get reports from time to time that the books were being posted or properly cared for?

A. Yes, I did.

Q. Who gave you that information?

A. The division management through my Accounting Department.

Q. The Accounting Department was headed by Mr. Conrad, who testified here a little while ago?

A. Yes, sir.

Q. Had you ever had any business experience before you went into this one at all?

A. No, sir.

Q. Now about this business of making checks and marking bills, do you remember anything about that?

A. I knew nothing of the details of it, sir. I knew that Jack Conrad established certain procedures for the convenience of his Accounting Department, but other than that I don't know.

Q. Did you ever tell him to do or not to do any certain thing in connection with the keeping of the books?

A. I don't recall necessarily that I directed him to do that specifically. That was his department.

Q. Did your brother William have anything to

(Testimony of Frederick Millard Rameson.)

do with the keeping of the books or did he confine himself to construction? A. That is correct.

Q. How often did you determine or inquire about your own bank balance?

A. At all times I knew our position was proper in regards to our bank balance. I don't recall any specific inquiries. To my knowledge we had not ever overdrawn at the bank.

Mr. Taylor: You may cross examine.

The Referee: Q. What was your reason for refusing to give a financial statement to a creditor or to Dun & Bradstreet?

A. Well, sir, we knew——

Q. What was your reason? Not what you knew but what was your reason?

A. Because our accountants said we were not in healthy enough a financial position to give a relationship between current and fixed assets which were not high enough to justify the form of business that we were doing, so we told the lending institutions and Dun & Bradstreet why we did not.

Q. In other words, you did not want to show your true financial condition?

A. We told them.

Q. Is that right?

A. No. We told them the reason why we did not want to show or issue our financial statement.

Q. Yet you were going to the public for credit without [45] a financial statement?

A. I don't know that. I didn't know we were

(Testimony of Frederick Millard Rameson.)

going to the public for credit. We did not borrow anything.

Q. You knew the loan companies were lending money on the houses? A. That is correct.

Q. Without any financial statement from you?

A. Well, I never thought of it in particular that way, sir.

The Referee: What is the next question?

Cross Examination

Q. (By Mr. Slane): Mr. Rameson, you say in no instance was a lot deeded to you boys, Rameson Brothers, upon which a house was either started or built by you. To refresh your memory I refer to your testimony in this court on the 7th day of January, 1953, when I cross examined you regarding this whole matter. It starts on page 30. Your testimony was to the effect that you would take the title, then you would go to Cal Federal or some other financing institution and borrow on the first trust deed the estimated cost of construction. That was my question. Your answer was, "That is correct." A. That is correct.

Q. Then I asked the question: "After that was completed you would go back to the original seller and give him a second trust deed on the property?"

You answered: "They usually filed that directly following the transaction. They filed it directly following the first. That was the general practice. They did not wait until title was finished.

"Q. Title stayed in Rameson Brothers?

(Testimony of Frederick Millard Rameson.)

"A. That is correct.

"Q. At what basis was the figure for the evaluation of those lots?" And we go into other phases.

A. That had reference to the lots we bought. There were no clients' lots involved. Those were lots we bought. In giving back a second to those who were sellers of the property, instead of getting the cash purchase price for the land the seller of the land would accept a second mortgage on the land. But those are our lots. They were not the clients'.

Q. Were they on any lots your clients had?

A. To my knowledge, no, sir. I answered that a few moments ago.

Q. You are certain of that?

A. To my knowledge, yes, sir.

Mr. Slane: If the Court wants to pursue that point further we can produce proof to the contrary if you want to take the time.

The Referee: I do. I want to do the right thing by these young men. Either they are entitled to a discharge or they are not, and I want to afford every opportunity to [47] both sides.

The Witness: To my knowledge that situation never existed.

Mr. Taylor: That is one simplification of this thing. It is as though I owned a lot and I deeded it to him to build a house, and after he made his loan from the company he then gives me for the purchase price a mortgage second to the other.

The Witness: No, sir.

(Testimony of Frederick Millard Rameson.)

The Referee: Then in the end I don't get my house.

The Witness: No, sir.

Mr. Taylor: No, your Honor. That is not my house. It is their house.

The Witness: Those are the lots that we bought ourselves—like Mr. Steinkamp, the subdivider—the client was not involved at all.

Mr. Taylor: I am paid for my lot by a second trust deed.

The Referee: I don't want any more argument on that. If you are going to build a house for me why should I convey my lot to you?

The Witness: We did not, sir.

Mr. Taylor: We did not build for you. I bought my lot from you.

The Referee: I don't believe it.

Mr. Slane: In fairness to these boys, your Honor, [48] there were some lots that they bought from Mr. Steinkamp and another one from——

The Witness: They were speculative houses.

Mr. Slane: There were 8 or 10 lots and about 8 of them were still in process when this matter went into bankruptcy. We finished up some of them and sold them and they gave back seconds to the parties they bought lots from, but those are not the ones I am speaking of. I am speaking of the other transactions where title came to Rameson Brothers from individual owners.

The Witness: To my knowledge not one situa-

(Testimony of Frederick Millard Rameson.)

tion such as that existed, sir. I don't know of any, sir.

The Referee: Do you gentlemen want to hear the rest of this matter tomorrow?

Mr. Slane: I think we can dispose of this petition which is also on the calendar for this afternoon. If we are going into the records on this other phase it would take longer than tomorrow because we will have to speak with Mr. Goggin and get his records on it and have them here.

The Referee: Anything further with this witness?

Mr. Slane: I have no further questions of Mr. Rameson.

Mr. Taylor: Is there any other remark you want to make?

The Witness: No, sir. I will welcome the records to clarify the point of contention. [49]

The Referee: That is all right. You are not being asked any questions.

The Witness: I am sorry.

Mr. Taylor: I will call William Rameson.

WILLIAM W. RAMESON

a bankrupt herein, called as a witness in his own behalf, being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Taylor): State your full name.

A. William W. Rameson.

Q. William, was your work confined to construction? A. Absolutely.

(Testimony of William W. Rameson.)

Q. Did you ever know anything about bookkeeping systems or who was doing that work?

A. No, beyond the fact that we had an accountant.

Q. Were you out in the field most of the time?

A. Practically all the time.

Q. Attending to the building of houses?

A. That is correct.

Q. Was it your job simply to keep track of construction, the crews and the efficiency with which they went from one job to another, and so on?

A. All of that.

Mr. Taylor: That is all.

Mr. Slane: I have no questions. [50]

Cross Examination

Q. (By Mr. Stockman): Mr. Rameson, do you state that you did not have any knowledge of the accounting procedures, is that right?

A. That is correct.

Q. As a partner interested in a big, going business did you make any attempt to find out about your accounting and business standing?

A. From that very statement you made there you must realize the business was big enough so that it took my entire time, my full time every day in the week. I would ask how things were doing, but then I went on about my own business the way a man should.

Q. But you made no specific attempt to find out the standing of your firm. You operated in the

(Testimony of William W. Rameson.)

field and paid little attention to the office matters. Is that correct? A. That is correct.

Mr. Stockman: That is all.

The Referee: What is next?

Mr. Slane: That is all we have on this matter of the objections to discharge.

Mr. Taylor: Your Honor, I would be derelict in my duty if I did not bring up the work sheets which Mr. Johnson prepared and which I used in the preparation of these matters and schedules here, and which showed the nature of the title and the lending institutions on the houses we are speaking of [51] showing them to be as I represent them.

The Referee: Do you have them here?

Mr. Taylor: No.

The Referee: Where are they?

Mr. Taylor: They are at my office.

The Referee: Why didn't you bring them?

Mr. Taylor: There was nothing to indicate that the matter of houses would be coming up today.

The Referee: What shall I do?

Mr. Slane: I don't think where title was is material to the issues in this case before the Court.

The Referee: We will disregard that.

Mr. Slane: As far as I am concerned I am willing to disregard my examination regarding houses.

The Referee: It is all out.

Mr. Slane: I don't think it is material to the question.

The Referee: It is all disregarded and out of my mind. Anything further?

Mr. Taylor: I have no more witnesses, but I would like to be heard for a moment.

The Referee: I will hear you.

Mr. Taylor: There are some things of which your Honor can take judicial cognizance, and should. One, the findings of other courts——

The Referee: Oh, no. Don't try to lead me off into [52] the criminal trial. I am not going with you.

Mr. Taylor: But there are some things that even in this kind of action should be proved.

The Referee: Not beyond a reasonable doubt like in a criminal case in the criminal courts.

Mr. Taylor: No, not beyond a reasonable doubt, but there should be shown fraud or intent to defraud, and so on. If it please the Court, I am confident that that does not appear in this matter.

If your Honor will permit me I should like to refer to a remark which you made at the time of the examination by creditors here, refer to one brief remark which you made when you were questioning Fred Rameson:

"Before you started in business did you have any experience in building anything?" The answer was "No, sir."

Then your Honor asked: "From a chicken coop on up to a kite? You started in without any knowledge of the building industry at all?"

He said, "I had built two or three houses prior, or a few houses actually prior to this.

"The Referee: You mean you were employed by someone to build them?

"The Witness: No.

"The Referee: Did you finance two or three houses before?

"The Witness: Yes, sir. [53]

"The Referee: In other words, you started from scratch in this thing, apparently, and didn't know anything about the building business and didn't know how to keep up with the financial status. Isn't that true? You sat there and took in money and didn't know what happened to it. All right, sir.

"The Witness: We didn't know that was the case."

From those remarks I gathered your Honor had the idea which was somewhat similar to the one which I had, that where a young soldier comes out of the service and goes to school and while there, also on government loan, builds a house, and when the restrictions were lifted sold it for a price of five or six thousand dollars more than he paid, he felt what was the use of going into the law business or taking the bar examination—he felt then and there he was in the building business. That was the situation. I can see here callous ignorance of business relations. I can see inexperience. I can see many things like that, but I cannot see an evil intent which I feel is necessary to substantiate the Objectors' case. I cannot see that there has been an evil intent to defraud others which would deny the discharge.

As I mentioned before, I am perhaps at fault. With some temerity I say again that I am too close to this thing perhaps to have a true picture of it,

but it cannot be gainsaid that I know it and I knew it because I got into it and became a part of ascertaining this thing within a few days [54] of the time when Mr. Slane's client did and I was with it all the way through from the beginning with various meetings of creditors and half boiling mobs of employees who had not been paid and whose checks had been stopped, and at my suggestion had been stopped, but I was prepared to do anything I could to help them.

I suggest to your Honor that some thought should be given to that before the Court recommends that the discharge be denied because their position is just as compatible with mistakes and with brash conduct—which is not fraudulent—the mistakes of youth, but certainly not with evil intent. I am and I have been for two years so full of this subject that it has become a part of me, perhaps too much so, but even then I cannot see evil here, and I cannot see why in justice and in equity, in the absence of evil, why a discharge should not be given.

The Referee: I am thoroughly convinced that these gentlemen refused to give a financial statement because they did not want their financial position to be known to persons who might extend credit. To my mind that indicates a desire at least to hide that which would be revealed by a statement. I think I shall deny the discharge. That will be the order.

Mr. Stockman: May I ask that your Honor's holding on the discharge be on both specifications:

No. 1, inadequate records, and No. 2, failure to explain?

The Referee: That is right. [55]

Mr. Taylor: May I ask that the other one not heard be dismissed?

The Referee: No, I won't dismiss it. I will let it stand unheard.

Mr. Sosson: Does your Honor's ruling apply with respect to the individual bankruptcies as well as the partnership?

The Referee: Yes, partnership and individually because they were all tied in together.

Mr. Slane: Shall we proceed to the objection to the claim?

(Which was all the evidence offered and received on the hearing on the objections to discharge.) [56]

[Endorsed]: Filed September 27, 1954.

[Endorsed]: No. 14930. United States Court of Appeals for the Ninth Circuit. Rameson Brothers, a co-partnership, composed of William E. Rameson and Frederick M. Rameson, bankrupt, and William E. Rameson and Frederick M. Rameson, co-partners, Appellant, vs. George T. Goggin, as Trustee in Bankruptcy of the Estate of Rameson Brothers, a co-partnership, composed of William W. Rameson and Frederick M. Rameson, Bankrupt, and Sol Jarmulowsky, Appellees. Transcript of Record. Ap-

peal from the United States District Court for the Southern District of California, Central Division.

Filed: November 2, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

[Endorsed]: No. 14931. United States Court of Appeals for the Ninth Circuit. Frederick M. Rameson, bankrupt, Appellant, vs. George T. Goggin, as Trustee in Bankruptcy of the Estate of Frederick M. Rameson, bankrupt, and Sol Jarmulowsky, Appellees. Transcript of Record. Appeal from the United States District Court for the Southern District of Califonia, Central Division.

Filed: November 2, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

[Endorsed]: No. 14932. United States Court of Appeals for the Ninth Circuit. William W. Rameson, bankrupt, Appellant, vs. George T. Goggin, as Trustee in Bankruptcy of the Estate of William W. Rameson, bankrupt, and Sol Jarmulowsky, Appellees. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: November 2, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14930

RAMESON BROTHERS, et al., Appellant,

vs.

GEORGE T. GOGGIN, et al., Appellees.

No. 14931

FREDERICK M. RAMESON, Appellant,

vs.

GEORGE T. GOGGIN, et al., Appellees.

No. 14932

WILLIAM W. RAMESON, Appellant,

vs.

GEORGE T. GOGGIN, et al., Appellees.

PETITION FOR EXTENSION OF TIME WITHIN WHICH TO FILE RECORD ON APPEAL AND DOCKET APPEAL

Comes now the appellant-bankrupt in the above-entitled cause and petitions this court for an extension of time within which to file the record on appeal and to docket the appeal for the following reasons:

On July 15, 1955 the appellant filed its notice of appeal in the United States District Court for the Southern District of California, Central Division, from the Order, Final Judgment and Decree denying the bankrupt a discharge filed and entered in

said court on the 15th day of July, 1955 and from the Order, Judgment and Decree denying the bankrupt a discharge filed and entered in said court on the 17th day of June, 1955;

That on August 8, 1955 the District Court signed an order extending the time to file the record and docket the appeal until October 7, 1955; and

That on September 9, 1955 the appellant-bankrupt filed with the Clerk of said District Court and served upon the appellees his Designation of Contents of Record on Appeal and Statement of Points Upon Which Appellant Intends to Rely on Appeal.

The Appellant has been in touch with the Clerk of the District Court several times since the time for a Designation of Additional Portions of the Record on Appeal has expired to ascertain when the record would be ready for transmission to his Honorable Court and only yesterday was informed that same would not be ready for filing by October 7th, 1955 the day of expiration of the Order of the District Court;

Wherefore, appellant-bankrupt prays that this Honorable Court extend the time for filing the record and docketing the appeal for an additional thirty days to enable the Clerk of the United States District Court for the Southern District of California, Central Division, to prepare the record on appeal and forward it to this Honorable Court for filing and docketing.

Dated: October 7, 1955.

PAUL TAYLOR,
DAVID SOSSON,
KYLE Z. GRAINGER,
/s/ By KYLE Z. GRAINGER,
Attorneys for Appellant-Bankrupt.

Subscribed and sworn to before me this 7th day of October, 1955.

[Seal] /s/ THEODORE HOCKE,
United States Commissioner for the Southern District of California, at Los Angeles.

[Endorsed]: Filed Oct. 7, 1955. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Causes.]

ORDER EXTENDING TIME TO FILE RECORD ON APPEAL AND DOCKET APPEAL

Good cause appearing from the foregoing Petition;

It Is Ordered that the time for filing the record on appeal and docketing the appeal be, and it hereby is, extended to and including the 7th day of November, 1955.

Dated this 7th day of October, 1955.

/s/ ALBERT LEE STEPHENS,
/s/ JAMES ALGER FEE,
/s/ RICHARD H. CHAMBERS,
Judges, United States Court of Appeals for the Ninth Circuit.

[Endorsed]: Filed Oct. 7, 1955. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Causes.]

STIPULATION AND ORDER FOR CONSOLIDATION OF ABOVE APPEALS

It Is Hereby Stipulated by the Appellants and Appellees in the above entitled causes that these appeals be consolidated; that one record be printed covering all of these appeals and that the briefs cover all of these appeals.

The reason for this stipulation is that the issues

on all of the appeals are practically identical; that the Reporter's Transcripts of the hearings are entitled in and cover all of the cases; that the appellees are the same in all of the cases and all of the appellants are involved in the partnership case; and that the same attorneys are involved in all of the cases.

Dated this 9th day of November, 1955.

PAUL TAYLOR,
DAVID SOSSON,
KYLE Z. GRAINGER,
/s/ By KYLE Z. GRAINGER,
Attorneys for Appellants

SLANE, MANTALICA & DAVIS,
/s/ By LEWIS TEEGARDEN,
Attorneys for Appellee George T. Goggin, etc.

LOUIS MOST,
ROBERT N. RICHLAND,
JACK LINCOLN,
/s/ By LEWIS MOST,
Attorneys for Appellee, Sol Jarmulowsky

ORDER

Good Cause Appearing from the foregoing stipulation It Is Ordered that these appeals be, and they hereby are, consolidated for all purposes; that but one record be printed covering all of the appeals and that the briefs to be filed cover all of the appeals in each set of briefs.

Dated this 10th day of November, 1955.

/s/ WILLIAM DENMAN,
Chief Judge
/s/ WM. HEALY,
/s/ H. T. BONE,
Judges, United States Court of Appeals

[Endorsed]: Filed November 14, 1955. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Causes.]

AMENDED STATEMENT OF POINTS

Come Now the Appellants in the above entitled causes and after Order Consolidating the above appeals for all purposes adopt the "Statement of Points Upon Which Appellant Will Rely Upon Appeal Filed July 15, 1955, From Order, Final Judgment and Decree Filed, Docketed and Entered on the 15th Day of July, 1955, and From Order, Judgment and Decree Dated June 15, 1955, Filed, Docketed and Entered the 17th Day of June, 1955" filed by the respective Appellants in the United States District Court for the Southern District of California as the Concise Statement of the Points on Which the Appellants Intend to Rely on the appeals in the above entitled causes as provided in Rule 17(6) of the Rules of the above entitled Court.

Dated: November 29, 1955.

DAVID TAYLOR,
DAVID SOSSON,
KYLE Z. GRAINGER,
/s/ By KYLE Z. GRAINGER,
Attorneys for Appellants

Affidavit of Service by Mail attached.

[Endorsed]: Filed Dec. 1, 1955. Paul P. O'Brien, Clerk.

Nos. 14930-31-32

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 14930

[redacted], et al.,

Appellants,

vs.

[redacted], Trustee in Bankruptcy, etc., et al.,

Appellees.

No. 14931

WILLIAM C. PEARSON, Bankrupt,

Appellant,

vs.

GEORGE T. DOGGIN, as Trustee in Bankruptcy, etc., et al.,

Appellees.

No. 14932

WILLIAM C. PEARSON, Bankrupt,

Appellant,

vs.

GEORGE T. DOGGIN, as Trustee in Bankruptcy, etc., et al.,

Appellees.

Appeals from the United States District Court for the Southern District of California, Central Division.

OPENING BRIEF OF APPELLANTS.

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Nos. 14930-31-32

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 14930

RAMESON BROTHERS, etc., *et al.*,

Appellants,

vs.

GEORGE T. GOGGIN, Trustee in Bankruptcy, etc., *et al,*

Appellees.

No. 14931

FREDERICK M. RAMESON, Bankrupt,

Appellant,

vs.

GEORGE T. GOGGIN, as Trustee in Bankruptcy, etc., *et al.,*

Appellees.

No. 14932

WILLIAM W. RAMESON, Bankrupt,

Appellant,

vs.

GEORGE T. GOGGIN, as Trustee in Bankruptcy, etc., *et al.,*

Appellees.

Appeals from the United States District Court for the Southern District of California, Central Division.

OPENING BRIEF OF APPELLANTS.

Jurisdictional Statement.

Creditors' petitions in involuntary bankruptcy were filed in the United States District Court for the Southern District of California containing the usual jurisdictional allegations required by Title 11, U. S. C. A., Secs. 11 and 12. The petition against Rameson Brothers, a co-partnership, appellant in case No. 14930, was filed on October 7, 1952. [Tr. p. 3.] The petitions against Frederick M.

Rameson and William W. Rameson, the members of the co-partnership, appellants in cases Nos. 14931 and 14932, respectively, were filed on October 23, 1952. [Tr. pp. 49 and 52.]

Orders of General Reference to the Honorable Hugh L. Dickson, one of the referees in bankruptcy for said district court, were made and entered on the same dates the respective petitions were filed, pursuant to Title 11, U. S. C. A., Sec. 66. [Tr. pp. 6 and 56.]

The partnership was adjudicated a bankrupt by said Referee on October 17, 1952 [Tr. p. 8] and the individual partners on November 3, 1952. [Tr. p. 56.]

On September 15, 1954 the said Referee in Bankruptcy made and filed Findings of Fact and Conclusions of Law [Tr. pp. 23-25 and 71-73] and Orders Denying Discharge as to each of the appellants. [Tr. pp. 25, 73.]

On September 22, 1954 each of the appellants herein filed a Petition for Review of the Referee's Order denying them a discharge as provided in Title 11, U. S. C. A. Sec. 67(c). [Tr. pp. 26-29, 74-80.]

On June 14, 1955 the District Court filed a Memorandum affirming the order of the referee and directed the preparation of formal orders. [Tr. 32 and 80.]

On July 13, 1955 the District Court filed and on July 14, 1955 the Clerk of said court entered Orders Affirming Referee's Orders denying each of the appellants a discharge. [Tr. 33, 83, 84.]

The following day, July 15, 1955, Notices of Appeal were filed by each of the appellants pursuant to Title 11, U. S. C. A. Sec. 48. [Tr. pp. 33, 83, 84.]

The United States District Court for the Southern District of California had jurisdiction of these cases by virtue of the provisions of Title 11, U. S. C. A. Sec. 11. This Honorable Court has juridiction of these appeals as provided in Title 11, U. S. C. A., Secs. 47 and 48.

Statement of the Case.

Creditors' involuntary petitions in bankruptcy were filed against each of the appellants and adjudications of bankruptcy were duly made by the Referee in Bankruptcy. [Tr. p. 8 and 56.]

On February 3, 1953 the said Referee in Bankruptcy made and filed an Order Fixing Time for Filing Objections to Discharge in which March 17, 1953 was fixed as the last day for the filing of objections. [Tr. pp. 11, 60.]

Sol Jarmulowsky, a creditor, filed Specifications of Objections to Discharge of the partnership on March 17, 1953 asserting that said bankrupt had failed to keep proper records, and books of account from which its financial condition and business transactions might be ascertained.

The Trustee in Bankruptcy, in each of the three cases, filed Petitions for extension of time to file objections to discharge and on March 13, 1953, May 13, 1953, July 15, 1953 and September 15, 1953 the referee in bankruptcy made orders extending the time to and including October 15, 1953 within which said trustee might file objections to discharge.

On October 15, 1953 the Trustee in Bankruptcy again presented a Petition for Extension of Time to Object to Discharge. In the partnership proceedings the Referee in Bankruptcy did not sign the order. [Tr. p. 18.] However the record shows that another Referee signed the orders in the individual cases. [Tr. p. 67.]

On November 17, 1953 the trustee filed Specifications of Objections to Discharge in each of the three cases asserting failure to explain satisfactorily the deficiency of assets to meet the liabilities. [Tr. pp. 19, 68.]

A hearing was held on the objections to discharge on August 31, 1954 [Tr. pp. 163 *et seq.*] at which time the Trustee attempted to "*substitute in* and adopt and prosecute the objection as made on behalf of Jarmulowsky."

The Referee in Bankruptcy made Findings of Fact and Conclusions of Law in each of the three cases in which he found that all of the objections were true as to each of the bankrupts [Tr. pp. 23, 71]and filed Orders Denying Discharges on September 15, 1954. [Tr. pp. 25, 73.]

Each of the appellants filed a Petition for Review of the Referee's Order on September 12, 1954. [Tr. pp. 26, 74.] The District Court filed a Memorandum on June 14, 1955 affirming the order of the referee and directing the Trustee to submit the appropriate orders of affirmance [Tr. pp. 32, 80] and on July 13, 1955 the court filed formal Order Affirming Referee's Order in each of the cases [Tr. pp. 32, 81] which orders were entered by the Clerk on July 14, 1955. [Tr. pp. 33, 82.]

Preliminary Statement as to Consolidation.

Separate Notices of Appeal were filed by each of the bankrupts on July 15, 1955 from both the Memorandum and the formal Order Affirming Referee's Order. [Tr. pp. 33, 83.]

In each of these matters now on appeal a written memorandum order was signed and filed prior to the entering

of a formal Order approving Referee's Orders, and appeals were taken from both on the possibility that such Memorandum order might be considered to be a final order. Also in each of these matters orders made were of similar content as in each other matter. Therefor, for brevity, whenever an order is mentioned, reference is intended to be made to all orders entered in every matter, unless otherwise specified.

Questions Involved and Presented.

1. Were the Trustee's Specifications of Objections to discharge of Rameson Bros., a co-partnership, and William W. Rameson barred as not filed within the statutory time limit?

2. Was it proper for the Referee to make findings and conclusions and the Referee and the Court to make and enter an Order denying discharge of Frederick M. Rameson and William W. Rameson based on Sec. 14-C, Subd. 2, of Bankruptcy Act when no specifications of objections were filed thereon against them?

3. Was there insufficient evidence to support the Orders denying discharge by the Referee and the Court and the findings and conclusions thereof, and did such findings support the conclusions and orders; and were such findings based on material evidence?

4. Did the Specifications of Objections filed state facts sufficient to constitute ground of objection to discharge?

5. Are the Orders denying discharge erroneous in that the judge on affirming the Referee's Orders failed to set forth Findings of Facts and Conclusions of Law?

Specification of Errors.

I.

There was insufficient evidence to support the Referee's Findings of Fact, Conclusions of Law, and Order Denying Discharge.

II.

The Findings of Fact of the Referee do not support his Conclusions of Law or Order Denying Discharge in that there was material variance between the findings and the specifications alleged and in that the findings merely described normal bookkeeping practices and did not support a *prima facie* case.

III.

There was insufficient evidence to support the Court's order denying discharge and also its Findings of Fact and Conclusions of Law if it be deemed the Court adopted those of the Referee, nor do such findings and conclusions support the Court's order denying discharge.

IV.

The order Denying Discharge by the Referee and by the Court erroneously assumed adoption of Specification of Objections by the Trustee of those filed by Sol Jarmulowsky after the time for filing had expired and when same constituted a new cause of action.

V.

The orders denying discharge by the Referee and by the Court were erroneous as to Frederick M. Rameson and as to William W. Rameson in that findings and con-

clusions were made and order made and entered under Sec. 14-C, subd. 2, of the Bankruptcy Act, pertaining to books and records, when in fact no Specifications of Objection had been filed against either of such individuals.

VI.

The Specifications of Objections filed did not state facts sufficient to constitute a ground of objection.

VII.

The Specification of Objections by the Trustee to the discharge of Rameson Bros., a co-partnership, was filed after time had expired within which to file such Specification of Objections.

VIII.

The Specification of Objections by the Trustee to the discharge of William W. Rameson was filed after time had expired within which to file such Specification of Objections.

IX.

The orders of the Referee and of the Court were erroneous in that immaterial evidence was admitted and the findings were based on such immaterial evidence.

ARGUMENT.

I.

Were the Trustee's Specifications of Objections to Discharge Barred as not Having Been Filed Within the Statutory Time?

On February 3, 1953, the Referee fixed the time for filing objections to discharge as required by the Bankruptcy Act giving all interested parties until March 17, 1953 within which to file their objections. [Tr. pp. 11, 60.]

On March 17, 1953, Sol Jarmulowsky, who alleges to be a creditor, filed Specifications of Objections to Discharge *in the partnership proceeding* charging failure "to keep proper records, books of account and records" basing his objection upon Section 14-c(2) of the Bankruptcy Act. [Tr. p. 21.]

The Trustee did not file objections to the discharge but on March 13, May 13, July 15 and September 15, 1953 obtained orders extending the time for filing his objections asserting that he had not completed his examination into the acts of the bankrupt relative to same. The last order on September 15th extended the time to and including October 15, 1953 within which the trustee might file objections to discharge.

Under date of October 15th the Trustee again presented a petition for further extension of time but the record discloses that *the order submitted was not signed by the referee.* [Tr. pp. 17-18.]

On November 17, 1953 the Trustee filed Specification of Objections to Discharge in the partnership proceeding asserting that the bankrupt had failed to satisfactorily explain the deficiency of its assets to meet its liabilities under Section 14-c(7) of the Act.

The courts have consistently held that any extension of time must be obtained before the expiration of that originally fixed as the court is without power to grant an extension after the time has expired.

See:

In re Levin (C. A. Mass.), 176 Fed. 177;

In re Brecher (C. A. N. Y.), 4 F. 2d 1001;

Rerat v. Fisk Tire Inc. (C. A. Minn.), 28 F. 2d 607;

In Re Kuhne, 18 Fed. Supp. 985;

In re Reigel, 21 Fed. Supp. 565.

Wherefore, appellants contend that in the partnership proceeding the referee was without jurisdiction to consider the Trustee's objections as they were filed more than a month after the expiration of the last order extending the time for filing of objections.

It is so fundamental that the question of jurisdiction is always before the Federal Courts that no citation of authorities is necessary to this Honorable Court.

Turning now to the individual proceedings the record discloses that an order was signed on October 15th by a different referee than the one to whom the case was regularly assigned extending the time for objections by

the trustee to November 17, 1953. [Tr. pp. 66-67.] However, an examination of the original papers in the certified record will disclose that such order was signed on October 15th in only the Frederick M. Rameson proceeding and not until October 16th in the William W. Rameson proceeding. Apparently the printer did not notice this difference at the time the record was printed.

It therefore appears that in only the Frederick M. Rameson proceeding did the Referee have jurisdiction to consider the Trustee's objections as such objections were not timely filed in the other proceedings.

The objections of Sol Jarmulowsky was only filed in the partnership proceeding. However, at the time of the hearing on the objections the following appears in the record:

> "Mr. Stockman: The Trustee would like to substitute in and adopt and prosecute the objection as made on behalf of Jarmulowsky. Mr. Cooper is here from that office. It is quite satisfactory that we prove up this objection.
>
> The Referee: Let's go ahead."

The Referee proceeded to make findings of fact and conclusions of law in all three of the proceedings sustaining both the objections of the Trustee and Jarmulowsky in all of them. The objections of Jarmulowsky were never filed in the individual proceedings and should not have been considered in those proceedings.

Defective specifications may be amended, in the discretion of the court, to correct or amplify them, but not to set up new matter and not to add a new ground of objection after the time for filing specifications has expired.

See:

In re Weston (C. A. N. Y.), 206 Fed. 281;

In re Hanna (C. A. N. Y.), 168 Fed. 238;

Northeastern Real Estate Securities Corp. v. Goldstein (C. A. N. Y.), 91 F. 2d 942;

In re Taub (C. A. N. Y.), 98 F. 2d 81;

Schlesinger v. Phillips (C. A. Tex.), 36 F. 2d 181;

In re Biro (C. A. N. Y.), 107 F. 2d 386.

To allow the prosecution of the Jarmulowsky objections in the individual proceedings permits the Trustee to make objections months after the time had expired.

See:

Richey v. Ashton (C. A. Cal.), 143 F. 2d 442;

In re Manasse (C. A. Ill.), 125 F. 2d 647.

So we find the untenable situation of having Jarmulowsky's objections timely filed in the partnership proceedings, substituted in and adopted by the Trustee, and the Trustee's objections timely filed in the Frederick Rameson proceeding which could properly be considered by the Referee but with findings of fact and conclusions of law in all of the proceedings finding all of the objections good as to all of the bankrupts.

The cases should be reversed and remanded to the referee for findings on the valid objections after a proper hearing limited to the issues raised on those objections.

II.

Was It Proper for the Referee to Make Findings of Fact and Conclusions of Law and Order Denying Discharges in the Individual Proceedings Based Upon Section 14-c(2) of the Act When no Specifications of Objections Based Thereon Were Filed Against Them?

The argument and authorities under the previous point are equally applicable here. The Jarmulowsky objections in the partnership proceeding were adopted by the Trustee. However, the Trustee did not ask that those objections be considered in the individuals' proceedings.

To have attempted to do so would have permitted new and additional grounds long after the time for filing objections had expired which cannot be done under the law.

Northeastern Real Estate Securities Corp. v. Goldstein (C. A. N. Y.), 91 F. 2d 942;

Richey v. Ashton (C. A. Cal.), 143 F. 2d 442;

Lerner v. First Wisconsin Nat. Bank, 294 U. S. 116, 79 L. Ed. 796, 55 S. Ct. 360;

In re Zaffer (C. A. N. Y.), 211 Fed. 936.

When a court makes findings of fact upon issues not raised in the proceeding before it and bases a judgment thereon the case must be reversed for a new trial on the issues property before the court.

True, Findings of Fact should not be set aside unless clearly erroneous. (Rule 52, Federal Rules of Civil Procedure.)

Even the Supreme Court must on appeal correct clear error even in findings of fact.

United States v. Yellow Cab Co., 338 U. S. 338, 94 L. Ed. ....., 70 S. Ct. 177;

United States v. U. S. Gypsum Co., 333 U. S. 364, 92 L. Ed. 92, 68 S. Ct. 525.

The courts of appeal should examine the findings of both the district court or referee for clear error.

Smith v. Federal Land Bank of Berkeley (C. C. A. 9), 150 F. 2d 318;

Earhart v. Callan (C. A. 9), 221 F. 2d 160;

Smyth v. Erickson (C. A. 9), 221 F. 2d 1.

Findings of fact which are induced by an erroneous view of the law are not binding on the court of appeals.

Galens Oaks Corp. v. Scofield (C. A. Tex.), 218 F. 2d 217;

Owen v. Commercial Union Fire Ins. Co. of N. Y. (C. A. Md.), 211 F. 2d 488;

Bjornson v. Alaska S. S. Co. (C. A. 9), 193 F. 2d 433;

United States v. El-O-Pathic Pharmacy (C. A. 9), 192 F. 2d 62.

In these appeals we find that the referee made findings of fact on issues which were not properly before him. He found the Trustee's Objections to Discharge sustainable in the partnership proceeding which objections had been filed after the time for filing objections had expired. He found the Creditor's objections true in the individual proceedings when those objections had never been filed in the individual proceedings.

All of these findings are clearly erroneous and the judgment based thereon should be reversed.

III.

Was There Insufficient Evidence to Support Orders by Court and Referee and Findings and Conclusions in Support Thereof, and Did Such Findings Support the Conclusions and Orders, and Were Such Findings Based on Material Evidence?

The burden of proof on objection to discharge is primarily on the objector as he must show to the satisfaction of the Court that there are reasonable grounds for believing that the bankrupt has committed an act which would prevent his discharge in bankruptcy. It essentially requires *prima facie* proof of the specifications. (*Remington on Bankruptcy* (6th Ed.), Vol. 7, p. 351.) If such a *prima facie* case is proved, the burden of proving he has not committed such an act shall be upon the bankrupt. (Bankrutcy Act. Sec. 14-C, as amended in 1926.)

Books and Records.

Sec. 14-C, subd. 2, of the Bankruptcy Act provides:

> "c. The Court shall grant the discharge unless satisfied that the bankrupt has . . .
>
> "2. destroyed, mutilated, falsified, concealed, or failed to keep or preserve books of account or records, from which his financial condition and business transactions might be ascertained, unless the Court deems such acts or failure to have been justified under all of the circumstances of the case. . . ."

This Honorable Court in the case of *Burchett v. Myers,* 202 F. 2d 920, 927, set forth the rule that the requirement under this section is in the alternative; that either books or records are sufficient so long as they make it possible to ascertain the financial condition and business transactions of the bankrupt.

The evidence produced by the testimony of the objector's own witness proved that bankrupts kept such books and records.

F. N. Johnson, a licensed public accountant was called as an expert witness. [Tr. p. 183.] He testified [Tr. p. 185] that the accounting system was adequate if properly maintained by posting accounts up to date and that then bankrupt could ascertain financial condition. He further testified [Tr. pp. 188-189] that there were records as to individual houses but that in working for the trustee he didn't use those figures, and said: "I built my own figures on it." We submit that it is quite significant that no testimony was given that the financial condition could *not* be ascertained from both the books and records, nor was there testimony that such was not done or not done due to difficulty. The attorney for the trustee stated in his opening argument that to find the true condition of the business—"It took a lot of work and a lot of time." [Tr. p. 166.] One test under this section is whether a competent accountant could ascertain the debtor's financial condition. (See *In re Frey,* 9 Fed. 376; *In re Graves,* 24 Fed. 550; *In Re Arnold,* 1 Fed. Supp. 499; *Burchett v. Myers,* 202 F. 2d 920.) No testimony was given that such could not be done. In fact the trustee's attorney indicated in his opening statement that such was done, though with difficulty.

Jack Conrad, former bookkeeper of the business was called as a witness by objectors. [Tr. p. 169.] He testified as to many matters upon which the Referee's findings were based. Checks were drawn in advance [Tr. p. 170]; bills were marked and posted as paid at the time checks were drawn and before the checks cleared [Tr. p. 171];

sometimes the payee was asked to hold a check until further word. [Tr. pp. 171-172.] The Referee's Findings 1 to 5. [Tr. pp. 23-24, 72.]

However, he testified further. The bankrupt's cardex system which was posted through a Burroughs Sensomatic was a common and regular way of keeping books [Tr. pp. 170-171]; that checks were made out for the convenience of the girls working under him when they had time, *and were left in the book* (emphasis ours) [Tr. p. 178]; checks were not handed out until they were to be paid [Tr. p. 178]; and *that such was common in bookkeeping* (emphasis ours) [Tr. p. 178]; offsetting entries were made reducing payables when checks were made as a bookkeeping procedure. [Tr. p. 180.]

It is submitted that the Referee's Findings 1 to 5 [Tr. pp. 23-24, 72], in no way tend to uphold his Conclusions of Law nor his Order as such were normal bookkeeping practice and also if both cash and payables were reduced on the books the financial condition would not be changed and net surplus or deficit, as the case might be, would remain exactly the same after a check was written as it was before the check was written.

The Referee's Finding 6 [Tr. pp. 24, 72], as to lack of posting prior to the time of the bankruptcy must be considered in the light of the rule previously discussed that books or records and not just books alone are to be considered. *In re McNab,* 58 Fed. Supp. 960, points out that the Court can take judicial notice that a bankrupt's books almost invariably lag as to posting when an insolvent and bankrupt condition exists, and that such a lag in posting must have continued for a substantial portion of the bankrupt's business career.

The Referee's Finding 7 [Tr. pp. 24, 72], states that the books and records did not truly reflect its financial conditions and business transactions as bills and invoices were marked paid before actual payment and as the firm was behind in posting entries in its books and records. This conclusion we submit is contrary to the evidence as heretofore discussed. Also we believe that the wording of this finding as to the firm being behind in "posting entries in its books of account or records" indicates that the Referee did not give consideration to the word "records" as used in the statute. Records must mean subsidiary instruments to the formal books, else there would be no distinction. Posting might involve posting from records to books, but could not involve posting to records. Conclusions of Law based on failure to keep books and records so as to be able to ascertain financial condition and business transactions, and order thereon, are erroneous when the terms "books of account" and "records" as used in the statute are not accorded separate dignity. See:

Burchett v. Myers, 202 F. 2d 920, 927.

We believe that this matter meets the test set forth in *In re Leichter,* 197 F. 2d 956, cert. den. 344 U. S. 914, in which it was held that the evidence must disclose that the failure to preserve records made it impossible to determine bankrupts financial condition and material business transactions; and we believe that objector did not and totally failed to prove facts to establish a *prima facie* case herein. Such case also sets forth the general rule that the right to a discharge in bankruptcy is statutory, and the provisions of the Bankruptcy Act which specify when discharge shall be granted must be strictly against the objector and liberally in favor of bankrupt.

It is also contended that there is no evidence whatsoever to support the Findings, Conclusions and Orders in that the specifications [Tr. pp. 21-22] set forth in particularity the defects claimed and that no proof was made of such particular items alleged.

The hearing is limited to the specifications filed.

In re Green, 53 Fed. Supp. 886;
In re De Cillis, 83 Fed. Supp. 802.

Mere admission of evidence not pleaded is not enough for amendment no motion being made to conform the pleading to the proof.

In re Deutsch, 36 A. B. R. (N. S.) 316.

Failure to Explain Deficiency of Assets.

Sec. 14-C, subd. 7, of the Bankruptcy Act provides:

"C. The Court shall grant the discharge unless satisfied that the bankrupt has . . .

"7. has failed to explain satisfactorily any losses of assets or deficiencies of assets to meet his liabilities. . . ."

We submit that no evidence whatsoever was introduced by objector on this ground. Counsel for Trustee in his opening statement [Tr. pp. 164-169] stated: "I would like to refresh your Honor's memory briefly . . ." [Tr. p. 164], and he then proceeded to read from a transcript of 21-A examination of Frederick M. Rameson and William W. Rameson. This transcript or testimony was not offered into evidence. Although it is conceded that the testimony of either of the individuals on such 21-A examination could have been entered into evidence, if desired, as to the specific individual or as to the partnership, a bankrupt's general examination is not to be

considered as in evidence unless actually introduced or stipulated into the record. (See *Remington on Bankruptcy,* (6th Ed.), Vol. 7, p. 365, and *Collier on Bankruptcy,* Vol. 1, p. 1289, and cases cited therein.)

If it be assumed that such testimony on 21-A examination should be considered evidence, even though not introduced, then it would be only just and proper to consider the surrounding questions and answers at such time. As recited by counsel for Trustee [Tr. p. 164] the Referee asked Frederick M. Rameson on 21-A examination [Tr. p. 111] that assuming he had lost $100,000, how did he account for having lost that much. However, on 21-A examination [Tr. p. 111] and immediately prior thereto counsel for Trustee stated: "How do you account for this thing happening? In other words, what was wrong with the operation of the business that brought about this serious condition in less than three years?" The bankrupt witness could only consider the word "account" as used in the questions as asking why the firm lost money, and not what happened to the money. Wrongful conduct, not ignorance, must be what Congress intended to penalize by denial of discharge. *In re West,* 158 F. 2d 858, held that the discharge provisions of the Bankruptcy Act must be liberally construed in favor of a bankrupt who has no intent to violate such provisions. Also see, *Albina v. Kuhn,* 149 F. 2d 108, *Roberts v. W. P. Ford & Son,* 169 F. 2d 151. *In re Louich,* 117 F. 2d 612, held that a discharge is a privilege accorded to bankrupts by the Bankruptcy Act unless they are chargeable with conduct showing some lack of personal business morality. *In re Rinker,* 107 Fed. Supp. 261, held that the rights of an honest bankrupt to a discharge from his debts is to be jealously protected. *In re Newman,* 126 F. 2d 336, held

the right to discharge in bankruptcy should be liberally construed. Cases holding a denial of discharge under this ground uniformly find that the bankrupt cannot explain what became of money, or that he prior to bankruptcy had certain assets which he no longer had at bankruptcy and could not explain the deficiency, as discussed *In re Horowitz,* 92 F. 2d 632.

It is significant that the objector does not attempt to claim or prove that any assets disappeared.

It is also significant that even though bankrupts did not know why they became bankrupt, that trustee did ascertain such from the books and records of the business, as counsel for Trustee stated in his opening argument that it took a lot of work and a lot of time to find out the true condition of the business [Tr. p. 166] and that from their examination they had determined what the costs were and that they were running far in excess of what they were contracting to do the jobs for. [Tr. p. 167.]

It is significant that after many continuances of time in which to object to discharge, all based on needing further time to examine into acts of bankrupt relative to filing objections, trustee could allege no more than a technical claim that Frederick M. Rameson stated in effect on 21-A examination that he did not know why the business lost money.

The record supports no suspicious circumstances as might establish a *prima facie* case so as to put the bankrupt to proof. See *Remington on Bankruptcy,* 6th edition, Vol. 7, page 356, and cases cited. The objector after extended examination into the business affairs failed to specify or prove any specific loss or deficiency that could not be explained by referring to the books and records of the business.

It should also be noted that the only possible inference that William W. Rameson stated, as claimed as the basis for objection in the specification filed, that he could not account for why the business lost money is that on being questions as to whether his testimony would be approximately the same as Fred, he answered "That is correct." [Tr. p. 167.] *Dilworth v. Boothe,* 69 F. 2d 621, held "The reasons for denying a discharge to a bankrupt must be real and substantial, not merely technical and conjectural."

IV.

Did the Specifications of Objections State Facts Sufficient to Constitute a Ground of Objection to Discharge.

Books and Records.

It was necessary as done for objector to allege in particularity any failure to properly maintain the books and records as the failure charged was not an absolute failure to keep books or records whatsoever. *Remington on Bankruptcy,* 6th Edition, Vol. 7, page 326, and cases therein cited.

The allegations tend to allege a possible basis for a nondischargeable debt, but such would not be a proper inquiry in a discharge matter.

In re Lowe, 36 Fed. Supp. 772.

Failure to Explain Loss or Deficiency.

It was necessary as done for objector to allege in particularity the grounds hereunder so as to appraise the bankrupt of what he had to meet.

In re Goldstein, 20 Fed. Supp. 403;

In re Karp, 11 Fed. Supp. 129.

The specific allegations allege that bankrupt stated he could not account for why the business suffered serious financial losses. As previously discussed, it is submitted that the statute is not concerned with the reasons for loss, but rather what became of assets which the bankrupt had had and did not have at the time of bankruptcy.

V.

Should the Judge Have Made Findings of Fact and Conclusions of Law.

In *Perry v. Bauman,* C. A. Cal., 122 F. 2d 409, at 410, it was held that following Rule 52 (a) of the Rules of Civil Procedure the Court must find facts specially and state separately its conclusions of law thereon. In these matters the Court made no findings, nor conclusions. The Referee so did, however, the findings of the Referee did not fully consider the allegations made in the Specifications to Objection to Discharge, and therefore there is a lack of findings on material issues.

In *Moonblatt v. Kosin,* 139 F. 2d 412 at page 415, it was held:

> "General Order No. 47 requires the District Judge to adopt the master's report, to modify it, or supplement or reject it. Implicit in the General Order is the requirement that the District Judge pass upon the referee's findings of fact, adopt or modify them, or if necessary, make findings of his own."

Conclusion.

We submit that from the facts and the law the order involved in this consolidated appeal, and each of them, and likewise the orders of the Referee approved and confirmed by the Court are, and each of them is, erroneous for the reasons herein discussed. We do not believe that the objectors put forth any real evidence of such a nature as Congress would have intended to penalize by denial of discharge, leaving the young men concerned herein forever saddled with oppressive debts. We believe that denial of discharge on the evidence and record herein presented is contrary to the spirit and intent of *Local Loan Co. v. Hunt,* 292 U. S. 234. We believe that there has been such compilation of errors that the bankrupts did not truly know what was expected of them in order to gain the relief of debts through a discharge in bankruptcy.

Respectfully submitted,

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Nos. 14930-31-32

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 14930.

RAMESON BROTHERS, etc., *et al.*,

Appellants,

vs.

GEORGE T. GOGGIN, Trustee in Bankruptcy, etc., *et al.*,

Appellees.

No. 14931.

FREDERICK M. RAMESON, Bankrupt,

Appellant,

vs.

GEORGE T. GOGGIN, Trustee in Bankruptcy, etc., *et al.*,

Appellees.

No. 14932.

WILLIAM W. RAMESON, Bankrupt,

Appellant,

vs.

GEORGE T. GOGGIN, Trustee in Bankruptcy, etc., *et al.*,

Appellees.

Appeals From the United States District Court for the Southern District of California, Central Division.

BRIEF OF APPELLEES.

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Appeals From the United States District Court for the Southern District of California, Central Division.

BRIEF OF APPELLEES.

Jurisdictional Statement.

Appellees adopt and incorporate herein the Jurisdictional Statement of Appellants.

Preliminary Statement Relative to Questions Involved.

In the matter before this Court there are two Specifications of Objections, one based upon Section 14-c, Subdivision (2) of the Bankruptcy Act, and the other based

upon Section 14-c, Subdivision (7). If the order of the Referee is sustainable on one of the grounds for denying a discharge, it is not necessary for this Court to consider the other ground. (*Dixwell v. Scott & Company* (C. C. A., Mass.), 115 F. 2d 873.) We shall, therefore (believing the evidence sufficient on the point), limit ourselves to Objections based on Section 14-c(7), without, however, waiving oral argument on the other. For convenience we follow Appellant's order of argument.

ARGUMENT.

(On Objections Based on Section 14-c(7).)

I.

Were the Trustee's Specifications of Objections to Discharge Barred as Not Having Been Filed Within the Statutory Time?

No objection was made on this ground at the hearing before the Referee, nor was such objection set forth in Appellants' petition for review of the Referee's Order.

The petition of a person aggrieved by an order of a Referee shall set forth the order complained of and the alleged errors in respect thereto. (U. S. C. A., Title 11, Sec. 67(c).)

The judge on review restricts his consideration of the case to the specified errors complained of in the petition and matters not then pressed or not mentioned in the petition will be considered as waived.

In re McCann Brothers Ice Co. (D. C., Pa.), 171 Fed. 265;

In re Peters (D. C., N. Y.), 39 Fed. Supp. 38, 39;

In re Massa, 133 F. 2d 191, 192.

A. Even if the Court Should Find No Waiver, the Referee Had the Power to and Did Extend the Time for Filing Specifications of Objections.

Rule 207 of the Bankruptcy Rules for the Southern District of California provides that any Referee may at any time act in any case pending before any other Referee at the request of the latter. It may be assumed that Referee Reuben G. Hunt was not acting beyond his powers and therefore was requested by Referee Dickson to sign the order in cases Nos. 55190 and 55191, extending the time for filing Objections to and including November 17, 1953. It may well be that under the circumstances Referee Hunt inadvertently failed to sign the order in case No. 55062, which was filed at the same time as the other petitions, assuming, no doubt, that the petition filed in cause No. 55062 was merely a copy of the one which he did sign.

Regardless of the order extending time, Referee Dickson impliedly extended the time by proceeding (without objection from the Appellants) with the hearing in all three matters on August 31, 1954. The filing of objections to discharge subsequent to the time fixed in the order for filing objections, notification to bankrupt of the filing, and the holding of a hearing thereon may be treated as evidence that the time for filing was extended, in the event that this Court should determine that there was no formal order of extension.

In re Massa (C. C. A. Conn.), 133 F. 2d 191, at pp. 191, 192.

The time may be extended for filing objections after the time has expired as well as before.

In re Levin (C. C. A. Mass.), 176 Fed. 177, 178, 179.

General Order No. 32, Section 53 of Title 11, does not operate as a Statute of Limitations.

In re Nathanson (D. C. N. Y.), 152 Fed. 585, 586.

On this point Appellants state on page 9 of their brief:

> "The courts have consistently held that any extension of time must be obtained before the expiration of that originally fixed as the court is without power to grant an extension after the time has expired."

In support of this statement the Appellants cite the following cases:

In re Levin (C. A. Mass.), 176 Fed. 177;
In re Brecher (C. A. N. Y.), 4 F. 2d 1001;
Rerat v. Fisk Tire Inc. (C. A. Minn.), 28 F. 2d 607;
In re Kuhne, 18 Fed. Supp. 985; and
In re Reigel, 21 Fed. Supp. 565.

A review of these cases will disclose that the *Levin, Brecher,* and *Rerat* cases hold exactly the opposite; and that the *Kuhne* case is not in point, due to the fact that the question presented in this case was a motion to amend after the time had passed for filing objections and the motion was granted. The *Reigel* case does so hold, under a literal interpretation of General Order No. 32 of the Supreme Court, as amended in 1933, that the filing of objections after the time set by the Referee is not permitted, and then the court, in that case, in order to prevent the discharge of the bankrupt, states that even without the objections being on record, the court can hear evidence at the time set for the hearing and deny the discharge. The actual words of the court are as follows:

> "This does not preclude the court from taking evidence to determine whether a discharge should

> be granted or withheld. Any party in interest may present such evidence in the same manner and with the same effect as if it had been offered by the original objecting creditor."

The one case which Appellants might have cited on this point (which they cite upon a subsequent point) is the case of *Lerner v. First Wisconsin National Bank,* 294 U. S. 116, which upon a first reading might cause one to believe it supported Appellants' theory. However, the court says at page 119:

> "Thus while an objecting creditor must file specifications showing grounds of his objection on the day when creditors are required to show cause, that day may be fixed or postponed by the court in view of the existing situation."

In a subsequent case, *Northeastern Real Estate Securities Corporation v. Goldstein,* 91 F. 2d 943, the court explains exactly what the Supreme Court meant in the case of *Lerner v. First Wisconsin National Bank, supra,* and shows the reason why the Supreme Court required objections to be filed on the day set, the reason being that many creditors would file objections merely for the purpose of intimidating the bankrupt to the point of making him pay the objecting creditor off, at which point the objecting creditor would withdraw his objections. Such reasoning would not apply to the objections of a Trustee. In the *Lerner* case the court calls attention to Order No. 37 which states in part:

> "But the court may . . . otherwise modify the rules for the preparation or hearing of any particular proceeding."

It thus shows that the question of filing petitions on the day fixed is not jurisdictional, and as shown in the case

of *Northeastern Real Estate Securities Corporation,* there is a distinction drawn between the filing date and the return date.

II.

Was It Proper for the Referee to Make Findings of Fact and Conclusions of Law and Order Denying Discharges in the Individual Proceedings Based Upon Section 14-c(2) of the Act When No Specifications of Objections Based Thereon Were Filed Against Them?

Appellees are in this brief limiting their argument to the Objections based on Section 14-c(7).

III.

Was There Insufficient Evidence to Support Orders by Court and Referee and Findings and Conclusions in Support Thereof, and Did Such Findings Support the Conclusions and Orders, and Were Such Findings Based on Material Evidence?

Appellants make much of the point that the 21-A examination of Frederick M. Rameson and William W. Rameson was not formally introduced at the hearing. No objection was made by Appellants either at the time of said hearing when reference was made to the transcript of the evidence taken in the 21-A examination [Tr. p. 164 *et seq.*], even though the statement was made that such transcript was part of the record [Tr. p. 164], and Appellants themselves accepted the fact that the 21-A examination was in evidence, as they quote therefrom extensively [Tr. pp. 209-210]. No objection was made by Appellants to the use of the transcript of such examination in Appellants' petition for review of the Referee's Order [Tr. p. 26 *et seq.;* p. 74 *et seq.*] even though the transcript of

the 21-A examination was included as part of the record in the Certificate of Review [Tr. pp. 31, 80].

The objection not having been made in the Court below, it will, of course, not be considered by this Court.

In re McCann Brothers Ice Co. (D. C. Pa.), 171 Fed. 265;

In re Massa, 133 F. 2d 191, 192.

Regardless, any testimony taken as authorized by a Referee is part of the record in the proceedings.

In re Samuelson (D. C. N. Y.), 174 Fed. 911, 912.

The Court will take judicial knowledge of its own records.

In re Osborne (C. C. A. Mass.), 115 Fed. 1, 2.

When an objector has shown to the satisfaction of the Court that there are reasonable grounds for believing that the bankrupt has failed to explain satisfactorily any losses of assets or deficiency of assets to meet his liabilities, then the burden of proof falls on the bankrupt to explain satisfactorily such losses.

Bankruptcy Act, Sec. 14-c(7);

In re Smatlak (C. C. A. Ill.), 99 F. 2d 687, 689.

Were there losses of assets?

The deficiency was, in the words of Frederick M. Rameson "somewhere around $200,000" [Tr. pp. 111-112].

Does the bankrupt satisfactorily account for such losses?

Again, in the words of Frederick M. Rameson: "Frankly, sir, I cannot account for it" [Tr. pp. 111-112].

Frederick M. Rameson stated that he was making a profit of from $2,000 to $3,000 per house, and when he was asked how he accounted for the tremendous losses, he stated that he could not account for it [Tr. p. 115]. Frederick M. Rameson showed a complete disinterest in the uses of the money obtained and a complete shielding of the actual operations of the business [Tr. pp. 116-117, 202].

William W. Rameson testified that his testimony would be approximately the same to each one of the questions asked of Frederick M. Rameson [Tr. pp. 146-147]. Throughout the testimony of both the Ramesons we find that there was a general unconcern and a complete disregard of the internal operations of the partnership.

In their testimony, the bankrupts failed to account at all for the losses sustained. Such failure to account at all is certainly a failure to explain satisfactorily; the greater includes the lesser. Nowhere in the 21-A examination or on the hearing on objections to discharge has any of the bankrupts in this case given any evidence whatsoever to explain the losses which resulted in the adjudication. We challenge Appellants to produce any case in which a Court has failed to sustain a ruling denying a discharge in bankruptcy where a bankrupt has *admitted* that he cannot explain the reason for loss of assets. It has been held that even where the bankrupt states that he lost certain sums, estimated on a basis of about 20% to 25% of the value of goods turned over during the year, by sales below cost to meet competition, this was not a satisfactory explanation of losses in answer to creditors' objections to discharge.

In re Beckman (D. C., N. Y.), 6 Fed. Supp. 957, 958.

IV.

Did the Specifications of Objections State Facts Sufficient to Constitute a Ground of Objection to Discharge?

Appellants having failed to make this objection before the Referee, may not raise it for the first time on appeal.

In re Osborne (C. C. A. Mass.), 115 Fed. 1, 3;

Nix v. Steinberg (C. C. A. Ark.), 38 F. 2d 611, 612 (cert. den. 282 U. S. 838);

In re Peters (D. C. N. Y.), 39 Fed. Supp. 38, 39.

Even had Appellants not waived this objection, the allegations were sufficient. Specifications of Objections are sufficient if they fairly apprise the bankrupt of the nature and grounds of the objection which is being made to his discharge.

In re Simon, 268 Fed. 1006, 1009; affirmed 276 Fed. 391.

A persual of the Trustee's Specifications shows the Trustee was relying on Section 14-c(7) of the Bankruptcy Act and that the transcript of the bankrupts' 21-A examination would be used as proof thereof.

The Trustee was not objecting to the loss of any specific assets, but to the bankrupt's failure to explain the deficiency of assets to meet his liabilities. *Collier on Bankruptcy* in Volume I at page 1401 states:

> "A bankrupt may be denied a discharge if he '(7) has failed to explain satisfactorily any losses of assets or deficiency of assets to meet his liabilities.'
>
> "This ground for denial of discharge was added to the Bankruptcy Act of 1898, in 1926, and was retained unchanged in the Act of 1938.

"Section 14-c(7) is broad enough to include any unexplained disappearance or shortage of assets, *as well as a mere insolvency itself, i. e.* an insufficiency of assets to meet liabilities."

Again in Volume I on page 1403 *Collier* states:

"Whether or not a mere showing of insolvency is sufficient to constitute a *prima facie* case has not been determined. The clause of the Act is broad enough to justify such an interpretation."

In *Federal Provision v. Ershowsky,* 94 F. 2d 574, 575, the Court stated:

". . .; and it would not be unduly severe to make the grant of all discharges conditional upon such an explanation. After all, nobody is in a better position to explain his losses than the bankrupt, and a discharge is a favor which ought to depend upon his utmost candor and cooperation."

In re Libowitz, 53 F. 2d 132, at p. 132, states:

"It is not enough for the bankrupt to leave it entirely to conjecture what became of his assets. He must not only explain, but explain satisfactorily any losses of assets or deficiency of assets."

Additionally, *In re Sperling,* 72 F. 2d 259, 261, states:

"When Section 14 of the Bankruptcy Act was amended in 1926 so as to preclude a discharge if a bankrupt 'has failed to explain satisfactorily any losses of assets or deficiency of assets to meet his liabilities,' we think Congress meant to require much more in the way of explanation than vague generalities."

All members of a bankrupt partnership actively connected therewith have the duty of explaining the deficiency

of assets to meet liabilities. Failure to do same is grounds for denying discharge to both the partnership and to the individual partners.

In re Miller, 52 Fed. Supp. 526, 527.

V.

Should the Judge Have Made Findings of Fact and Conclusions of Law?

Title 11, Section 11(10) of U. S. C. A., provides that the Courts shall "consider records, findings and orders certified to the judges by referees, and confirm, modify or reverse such findings and orders, or return such records with instructions for further proceedings; . . ." It would appear, therefore, that the Court, upon a review of the Referee's order and records did confirm "such findings and orders." Are not Appellants requesting a useless act of the Court in asking that it copy the findings and conclusions of the Referee to be added to the record as the Court's separate findings, after having already confirmed them? Certainly it does not require any stretch of the imagination to assert that a judge in confirming findings and orders of a referee is adopting such findings and orders as his own.

The Appellants, under this heading, state:

> ". . . the findings of the Referee did not fully consider the allegations made in the Specifications of Objection to Discharge, and therefore there is a lack of finding on material issues."

Is it not the duty of Appellants to specify to the Court how and in what manner the Referee failed to consider the allegations and also to point out wherein there is a lack of findings on material issues so that the Court will not be burdened with the work of searching the record

for itself to determine such point? Appellees have searched the record and find no basis for such objection.

General Order No. 47 requires that the judge on review shall accept the Referee's findings of fact unless found to be clearly erroneous, and in the cases of *International Harvester v. Carlson,* 217 Fed. 736 and *In re Covington,* 110 Fed. 143, the Courts confirm that the Referee's findings of fact are entitled to the very highest consideration and should be accepted upon review, unless very plainly shown to be wrong.

Respectfully submitted,

SLANE, MANTALICA & DAVIS,
By LEWIS C. TEEGARDEN,
Attorneys for Appellees.

Nos. 14930-31-32

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Appeals From the United States District Court for the Southern District of California, Central Division.

REPLY BRIEF OF APPELLANTS.

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Appeals From the United States District Court for the Southern District of California, Central Division.

REPLY BRIEF OF APPELLANTS.

I.

Were the Trustee's Specifications of Objections to Discharge Barred as Not Having Been Filed Within the Statutory Time?

Counsel for appellees state that certain cases cited by appellants "hold exactly the opposite" to that contended by the appellants. In our opinion the cases go even further than contended by appellants.

In *In re Brecher* (C. A. N. Y.), 4 F. 2d 1001, the court entered a *nunc pro tunc* order allowing the filing of the specifications of objections after the time had expired because of excusable neglect of a clerk in filing the specifications *48 hours* after the time had expired. In so doing the court quoted from *In re Clothier* (D. C.), 108 Fed. 199, that "General Order 32 should be strictly complied with, and failure so to do will only be excused when excellent reasons therefor are shown to the court." Surely the negligence of a clerk in the bankruptcy court should not be used to penalize a litigant.

In *Rerat v. Fisk Tire Inc.* (C. A. Minn.), 28 F. 2d 607, the trustee had made timely appearance and obtained time within which to file his specifications. On the day to which time had been extended additional claims were filed which had not been scheduled and "The trustee and the creditors cooperating with him were surprised." Later, on proper motion, the court permitted them to file their specifications of objections.

And in *In re Kuhne*, 18 Fed. Supp. 985, the court said:

> *"The court is powerless to extend the time within which the creditor may file specifications of objections, although in certain instances for a good cause shown the court may adjourn the entire proceedings for a reasonable time."*

In this case fraud was alleged based upon newly discovered evidence. The court said that even if the discharge had been granted the allegations, if proven, would be sufficient to set aside the discharge, so in the exercise

of its equitable powers, the court granted a motion to amend the specifications.

The Court in *In re Reigel*, 21 Fed. Supp. 565, said: "The court is without power to extend the time within which objections to discharge may be filed." (P. 566.)

Counsel for appellees then say: "* * * and then the court, in that case, in order to prevent the discharge of the bankrupt, states that even without the objections being on record, the court can hear evidence at the time set for the hearing and deny the discharge." and quotes from the case itself. However, appellee's own quotation is that *"Any party in interest may present such evidence in the same manner and with the same effect as if it had been offered by the original objecting creditor."* Does appellee contend that this allows the court to hear the matter "even without the objections being on record?"

Section 14(b) of the Bankruptcy Act provides:

> "* * * Upon the expiration of the time fixed in such order or of any extension of such time granted by the court, *the court shall discharge the bankrupt if no objection has been filed; otherwise, the court shall hear such proofs and pleas as may be made in opposition to the discharge.* * * *"

Therefore, it is clear that the Act itself provides for a hearing *only* if objections have been filed. In the *Reigel* case objections had been filed. This case holds that if valid objections have been filed by one creditor any other creditor may prove up the objections. To hold otherwise would permit a bankrupt to make a deal with an object-

ing creditor after other creditors had relied upon the objections on file and after the time had expired for the filing of objections. The court should not require each creditor to make the same objections and encumber the record but should allow any creditor to rely upon any valid objection on file.

And in the *Levin* case in 176 Fed. 177, the referee, within the time for any objections, advised the court that "Not having as yet sufficient information upon which to make report upon the bankrupt's application for discharge * * *" he would like to have the matter continued and it was continued.

All of these cases, as contended by appellants, hold that any extension of time for filing objections to discharge must be based upon good and sufficient reasons. Under the old act the cases hold that the court is without power to grant an extension but under its equitable powers could continue the hearing or, if the circumstances of the particular case warranted, could permit late filing of the specifications.

But in the case at bar it is contended that no good and sufficient reason for any extensions had been shown. When the specifications were filed in November they were based upon information the trustee knew since January.

Appellants contend that any extension of time to file the specifications under Section 14(b) of the Act must be obtained within the time originally fixed or any valid extension thereof or the court loses jurisdiction to hear the objections, unless upon proper motion based upon good and sufficient reasons the court permits the late filing of the specifications.

II.

Evidence Was Insufficient to Support Orders by Court and Referee and Findings and Conclusions in Support Thereof.

Appellees make much of the portion of one answer of the bankrupt Frederick M. Rameson while a witness at a 21A examination that "Frankly, sir, I cannot account for it," *i. e.* account for the deficiency of assets to meet the liabilities. Perhaps it was unfortunate that the witness used these words. However, the court should not base its finding upon these few words. The balance of the answer explains what the witness meant. He was amazed to learn they had been operating at a loss.

All of the evidence must be considered to determine if the findings of the referee were based upon sufficient evidence. An examination of the evidence will show that the bankrupts started out building houses making a profit of from $2,000.00 to $3,000.00 on each house and the witness testified they tried to establish a minimum fee in building a house of $2,500.00. [Tr. p. 114.]

An examination of all of the evidence will disclose that the bankrupts started out in a small way, using chiefly subcontractors to build the houses, but gradually doing more and more of the building themselves with their own employees, setting up their own architectural staff, electrical, landscaping, cabinet making and painting divisions. The evidence also discloses that the accounting department failed to keep up with the increased business and that is probably where the cause of the failure arose; ignorance of the true financial condition until the situation was hopeless. But all bankrupts have gone broke or they would not be in the bankruptcy court. The fact that

there were not sufficient assets to meet the obligations is not ground for denial of a discharge! Only the failure to explain *satisfactorily* any losses of assets or deficiencies of assets to meet the liabilities is sufficient. Appellants contend the explanations were sufficient and that the findings to the contrary are clearly erroneous and should be corrected.

Appellees challenge the appellants to produce any case in which the court failed to sustain a denial of a discharge where a bankrupt has *admitted* that he cannot explain the reason for the loss and cite *In re Beckman,* 6 Fed. Supp. 957.

The *Beckman* case was a failure to keep proper books and records case in which the bankrupt admitted he had made gifts to relatives while insolvent and also *estimated* that he had lost $5,000.00 through sales at a loss to meet competition. The court held that the books did not verify or affirm these estimates and therefore the explanation could not be regarded as satisfactory.

In the cases at bar the evidence is exactly to the contrary. The books and records account for all of the assets and explain the reason for the deficiency in assets to meet the liabilities. The bankrupts were *unwittingly* operating at a loss. As soon as the bankrupts learned this they acted immediately to prevent any further losses and gave all information to the creditors.

Frederick Millard Rameson testified as follows [Tr. p. 125]:

> "* * * You see, when I got the information on Friday, the following Monday immediately as soon as I knew the problem, I went to the two major lending institutions and laid all of the facts rightly

clearly before them, and the following Wednesday, two days following, I laid all of the facts completely before the major creditors."

Appellants have been unable to find a reported case where a discharge was denied under circumstances similar to the evidence in the case at bar. That is one of the reasons appellants are contending that the findings are not supported by the evidence. Appellants contend that the findings are clearly erroneous and should be corrected by this court. (See cases cited, App. Op. Br. p. 13.)

Appellants contend that in addition to insufficient evidence to sustain the findings and order the objectors failed to establish a *prima facie* case. As set forth on page 20 of Appellant's Opening Brief, counsel for Trustee admitted that the Trustee had been able to ascertain from the books and records the true financial condition of the business and the costs which were running far in excess of the contract price. *What was there for bankrupts to answer.* No charges were made that any business transaction was not reflected in the books or records. No charges were made that any actual assets were unaccounted for. Cases cited by Appellees involve situations where deficiency could only loosely be explained and which involved the element of concealment. In the instant matter the trustee had actual knowledge from the books and records as to why the loss was incurred. After such an admission and as no claim was made to disappearance of assets Appellants contend that objector has not established a *prima facie* case to place the burden of proof of satisfactory explanation on bankrupts.

Conclusion.

We respectfully submit, as we did in our opening brief, that from the facts and the law that the orders involved in this consolidated appeal should be reversed.

PAUL TAYLOR,
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KYLE Z. GRAINGER,
Attorneys for Appellants.

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Appeals From the United States District Court for the Southern District of California, Central Division.

PETITION FOR REHEARING.

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Appeals From the United States District Court for the Southern District of California, Central Division.

PETITION FOR REHEARING.

Appellants respectfully petition this Court for a rehearing of the Opinion of this Honorable Court, heretofore rendered in the above entitled matter as of January 2, 1957, upon the following grounds:

Reference is made to the second paragraph, beginning on the 7th line at page 2 of the Opinion: The bankrupts

built houses after they had been sold on contract, with the exception of some built on their own account upon lots sold to them by a subdivider for a second encumbrance instead of cash [Clk. Tr. pp. 204, 205].

It is true the bankrupts were building houses for sale, but all but ten of them were built pursuant to contracts. They had started their business in October, 1949 [Clk. Tr. p. 110]. They built from 150 to 175 houses before any of the 35 or 36 which were scheduled in the bankruptcy [Clk. Tr. p. 200], and during this time the bankrupts relied wholly upon their bookkeeping department.

The Referee said he did not believe the testimony [Clk. Tr. p. 205], even though Trustee's counsel supported the bankrupts. It is respectfully submitted that when subdivision tract owners find a contractor who will build a house upon a lot sold to the builder for a second trust deed, the erection of that house creates additional demand for the seller's lots, and hence it is a common subdivider-builder practice, often referred to as "subordination" agreement, and is good business practice, especially in a fast-growing community such as the Los Angeles Metropolitan area. It appears that the Referee did not understand this [Clk. Tr. pp. 204-205]. And although he stated he did not believe it, yet there is no contrary evidence in the record to support his skepticism.

Page 3 of the Opinion, beginning with the third paragraph and the words, "The evidence clearly showed there were not sufficient books or records kept," etc., it is submitted that this deduction stems principally from the introductory remarks of counsel for the Trustee at the opening of the hearing of the hearing of Opposition to Discharge [Clk. Tr. pp. 164-168]. Appellees' chief witness

on this subject was bankrupts' chief accountant and head of their bookkeeping department [Clk. Tr. p. 170]. He personally lost $4,500 on the construction of his own house [Clk. Tr. p. 177] by his employers, the bankrupts [Clk. Tr. p. 177] on which he kept books for them by his own system [Clk. Tr. p. 176]. He changed this system from a separate account for each house built to a general account, with the sanction of bankrupts' certified public accountant, Mr. Redmond [Clk. Tr. p. 176]. The bankrupts knew nothing about accounting or records other than as told them by their own chief accountant, Mr. Conrad [Clk. Tr. p. 200].

Beginning on page 3 of the Opinion, near the center of the last paragraph, with the words, "The Trustee indicated that by great labor, etc." The Trustee's own accountant, Mr. Johnson, testified he did not do considerable or extensive work on the bankrupts' books—only preliminary work [Clk. Tr. p. 183]. He said the accounting system was adequate had it been kept up to date[Clk. Tr. p. 185], and the books were apparently OK excepting the general ledger had not been posted during July, August, and September [Clk. Tr. p. 185]. He also stated that bankrupts' bookkeeper, Mr. Conrad, assisted him and took responsibility for the books and the system [Clk. Tr. p. 187]. The latter also worked for the Trustee for ten days or so.

As to the Opinion, page 7, beginning with the words, "The Referee remarked during the hearing . . ." It is submitted that the last sentence of the paragraph in quotations was a mistake by the Referee, in that there was no evidence the bankrupts induced any person to convey to them a lot or lots. As above mentioned, two subdividers sold lots to the bankrupts for a second trust deed,

but the bankrupts did not solicit this business. Counsel for the Trustee concerning these houses stated [Clk. Tr. p. 208]:

> "Mr. Slane: I don't think where title was is material to the issues in this case before the Court.
>
> The Referee: We will disregard that.
>
> Mr. Slane As far as I am concerned I am willing to disregard my examination regarding houses.
>
> The Referee: It is all out.
>
> Mr. Slane: I don't think it is material to the question.
>
> The Referee: It is all disregarded and out of my mind. Anything further?"

The appellants never had any business experience before this contracting business [Clk. Tr. p. 201]. The other partner had to do only with construction.

It is respectfully requested that a rehearing be granted that the Opinion of this Court may be reformed to correctly reflect the findings supported by evidence.

Respectfully submitted,

PAUL TAYLOR,

Attorney for Appellants.

Certificate of Counsel.

I, PAUL TAYLOR, counsel for Petitioners in the above entitled action, hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay, and in my opinion is well founded in law and in fact, and proper to be filed herein.

PAUL TAYLOR,

Attorney for Petitioners.